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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 2004

GARY McDOWELL and ROSELEA McDOWELL,
Petitioners,

v.

PROVIDENCE HEALTH CARE PLAN,
an Oregon non-profit corporation,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW
[SCR 14(a)]

1. Is an ERISA-fiduciary's state law claim against an ERISA-plan member for reimbursement filed in state court, which claim is based on the express language of the ERISA plan, completely preempted and removable to federal court?

2. Did this Court in *Great West Life & Annuity Ins. Co. v. Knudson*, 524 US 204, 122 SCt 708, 151 LEd2d 635 (2002), intend to leave open the door for ERISA plan fiduciaries to sue plan members in state court to enforce a reimbursement provision of an ERISA plan?

PARTIES TO THE PROCEEDING

CORPORATE DISCLOSURE STATEMENT

[SCR 14(b)]

The caption contains the names of all the parties. Defendants Gary and Roselea McDowell below are petitioners herein, and therefore no corporate disclosure statement is required of them.

TABLE OF CONTENTS

[SCR 14(c)]

QUESTION PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

I. CITATIONS TO DECISIONS BELOW 1

II. BASIS FOR JURISDICTION 2

III. STATUTES AT ISSUE 2

IV. STATEMENT OF THE CASE 3

A. Basis of Jurisdiction in the Court of First Instance 3

1. **USDC Case No. 01-1704-JE (“*McDowell I*”)** 3

2. **USDC Case No. 02-6110-TC (“*McDowell II*”)** 4

3. **Ninth Circuit Case Nos. 02-35263 and 02-35841** 4

B. Statement of Material Facts and Proceedings Below 4

1. **Statement of Facts** 4

2. **Statement of Proceedings** 7

V. REASONS WHY THIS COURT SHOULD GRANT CERTIORARI.....8

Question No. 1 8

Question No. 2 12

VI. ARGUMENT 13

Introduction.....13

A. Providence's Claim for Breach of Contract Is Completely Preempted by ERISA and Removable (Question No. 1)...14

1. Providence's Claim Relates to the Health Care Plan 14

2. Providence's Claim Falls within the Scope of § 1132 18

B. This Court Did Not in *Great West* Contemplate that a Fiduciary Could Bring a State Law Claim for Reimbursement in State Court (Question No. 2) 21

CONCLUSION 26

APPENDICES

A Amended Opinion (385 F3d 1168).....A-1

B Order Denying Petition for Rehearing *en banc*.....B-1

C Dissenting Opinion.....C-1

D Original Opinion (361 F3d 1243).....D-1

E Opinion and Order of Judge Jelderks in USDC Case No. 01-1704-JE.....E-1

F Order of Judge Coffin in USDC Case No. 02-6110 .....F-1

G Complaint in Linn County Circuit Court, removed to USDC No. 01-1704-JE G-1

H Complaint in USDC Case No. 02-6110-TC H-1

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TABLE OF AUTHORITIES

[SCR 14(c)]

Federal Cases

Abraham v. Norcal Waste System,
265 F3d 811 (9th Cir 2001) 18

Aetna Health, Inc. v. Davila, ___ US ___,
124 S Ct 2488, 159 LEd2d 312 (2004).....11

Avco Corp. v. Machinists, 390 US 557,
20 L Ed 2d 126, 88 S Ct 1235 (1968).....20

Bast v. Prudential Ins. Co., 150 F3d 1003
(9th Cir 1998) 15

Bauhaus v. Copeland, 292 F3d 439
(5th Cir 2002) 9

Blue Cross of California v. Anesthesia Care,
187 F3d 1045 (9th Cir 1999) 17

Carpenters Health v. Vonderharr,
384 F3d 667 (9th Cir 2004) 26

*Cement Masons Health and Welfare Trust
Fund v. Stone*, 197 F3d 1103 (9th Cir 1999) ..9, 10, 21, 22

Clorox v. US Dist Ct for N.D. of Cal.,
779 F2d 517 (9th Cir 1985) 12

Community Health Plan v. Mosser,
347 F3d 619 (6th Cir 2003) 9

Cooperative Benefit Adm. v. Ogden,
367 F3d 323 (5th Cir 2004) 9

Engelhardt v. Paul Revere Life Ins. Co.,
139 F3d 1346 (11th Cir 1998).....12

FMC Medical Plan v. Owens,
122 F3d 1258 (9th Cir 1997).....9, 10, 21, 22

General American Life Ins. Co. v.
Castonguay, 984 F2d 1518 (9th Cir 1993) 17

Great West Life & Annuity Ins. Co. v.
Knudson, 534 US 204, 122 S Ct 708,
151 LEd2d 635 (2002) ..... passim

Honolulu Joint App. & Train. Comm v.
Local Union No. 675, 332 F3d 1234
9th Cir 2003) 9, 22

Jass v. Prudential Health Care Plan, Ins.,
88 F3d 1482 (7th Cir 1996).....12

Kentucky Association of Health Plans
V. Miller, 538 US 329, 123 S Ct 1471,
155 LE 2d 468 (2003) 14

Massachusetts Mutual Life Insurance Co.
v. Russell, 473 US 134, 87 L Ed 2d 96,
105 S Ct 3085 (1985) 15

McCoy v. Mass. Inst. of Tech.,
950 F2d 13 (1st Cir 1991).....12

Mertens v. Hewitt Assoc., 508 US ~~248~~,
113 S Ct 2063, 124 LEd2d 161 (1993).....10, 11

Metropolitan Life Ins. Co. v. Taylor,
481 US 58, 107 S Ct 1542, 95 LEd2d 55
(1987) .....passim

New York State Conference of BlueCross & BlueShield Plans v. Travelers Ins. Co., 514 US
645, 115 S Ct 1671, 131 L Ed2d 695 (1995) 15, 16

Pacificare v. Martin, 34 F3d 834 (9th Cir 1994).....9, 22

Pilot Life Ins. Co. v. Dedeaux, 481 US 41,
107 S Ct 1549, 95 L Ed 2d 39 (1987).....passim

Primax Recoveries v. Sevilla,
324 F3d 544 (7th Cir 2003).....9

Providence Health Plan v. McDowell,
361 F3d 1243 (9th Cir 2004),
amended 385 F3d 1168 (9th Cir 2004).....passim

Qualchoice, Inc. v. Rowland,
367 F3d 638 (6th Cir 2004).....9

Reynolds Metals v. Ellis, 202 F3d 1246
(9th Cir 2000).....9, 22

Shea v. Esensten, 107 F3d 625 (8th Cir 1997).....12

Toumajian v. Frailey, 135 F3d 648 (9th Cir 1998)....19

Westaff v. Arce, 298 F3d 1164
(9th Cir 2002).....9, 10, 22

State Cases

Behavioral Sci. Inst. v. Great-West Life,
84 Wn App 863, 930 P2d 933 (1997) 25

Fireman's Ins. v. Motors Ins.,
245 Or 601, 423 P2d 754 (1966) 6

Jefferson-Pilot Life Ins. Co. v. Krafka,
50 Cal App 4th 190, 57 Cal Rptr 2d 723 (1996) ...25

Liberty Northwest Ins. Corp. v. Kemp,
192 Or App 181, 85 P3d 871 (2004) 25

Milwaukie Mechanics' Ins. Co. v. Ramsey, 76 Or 570, 149 P 542 (1915) 16

United Pacific Co. v. Schetky Equipment Co.,
217 Or 422, 342 P2d 766 (1959) 16

Statutes

28 USC § 1254 2

28 USC § 1291.....4

28 USC § 1441 3

29 USC §§ 1001, *et seq*.....2

29 USC § 1132 .....passim

29 USC § 1144 .....passim

Other Authorities

Roger M. Barron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom*, 55 Mercer L Rev. 596, 633 (2004).....26

IN THE
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GARY McDOWELL and ROSELEA McDOWELL,
Petitioners,
v.
PROVIDENCE HEALTH CARE PLAN,
an Oregon non-profit corporation,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

I. CITATIONS TO DECISIONS BELOW
[SCR 14(d)]

The Ninth Circuit's amended opinion was issued on October 1, 2004. The official citation is 385 F3d 1168. In addition, on that same date, the Ninth Circuit entered an order denying defendants McDowells' petition for rehearing or hearing *en banc*, and seven judges (six active and one senior) filed a dissenting opinion from the order denying the petition. The Ninth Circuit's original opinion was filed on March 24, 2004. The official citation is 361 F3d 1243. The Ninth Circuit's opinions were issued in consolidated appeals filed by Providence Health Care from two adverse judgments of the United States District Court for the District of Oregon in case numbers 01-1704-JE (hereinafter, "*McDowell I*") and 02-6110-TC ("*McDowell II*"). Neither district court opinion was published (but each is included in the appendix hereto).

II. BASIS FOR JURISDICTION

[SCR 14(e)]

The amended opinion of the Ninth Circuit, the order denying defendants McDowells' petition for rehearing or hearing *en banc*, and the dissenting opinion from the order denying defendants McDowells' petition, were entered on October 1, 2004. This court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 USC § 1254.

III. STATUTES AT ISSUE

[SCR 14(8)]

This case involves the application of certain provisions of ERISA, 29 USC §§ 1001 et seq. Specifically, parts of 29 USC §§ 1132 and 1144 are applicable. 29 USC § 1132(a)(3) provides:

> A civil action may be brought
>
> ...
>
> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

29 USC § 1144(a) provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title. This section shall take effect on January 1, 1975.

29 USC § 1144(c)(1) provides:

> ... The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

IV. STATEMENT OF THE CASE

A. Basis of Jurisdiction in the Court of First Instance [SCR 14(g)(ii)]

1. **USDC Case No. 01-1704 JE ("*McDowell I*"):** On October 18, 2001, plaintiff Providence filed a claim in state court for breach of contract. Complaint, App: G-1-6. Defendants McDowell removed the claim to the district court for the district of Oregon pursuant to 28 USC § 1441(a). Providence moved to remand, and defendants McDowells moved to dismiss. Providence's motion to remand was denied, and defendants McDowells' motion to dismiss was granted because Providence's claim was preempted by

ERISA. Opinion and Order, App: E-1-7.[1] The district court had exclusive original jurisdiction of an ERISA claim under 29 USC § 1132(e).

2. **USDC Case No. 02-6110-TC ("*McDowell II*"):** After Providence's claim in *McDowell I* was dismissed, on April 12, 2002, Providence filed a complaint asserting a claim under 29 USC § 1132(a)(3) for reimbursement in the district court for the district of Oregon. Complaint, App: H-1-7. Defendants McDowell moved to dismiss Providence's claim under 29 USC §1132(a)(3) based on this Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, *infra*, and Providence moved for summary judgment. Defendants McDowells' motion to dismiss was granted, and Providence's motion was denied. Order, App: F-1-7. The district court had exclusive original jurisdiction of an ERISA claim under 29 USC § 1132 (a).

3. **Ninth Circuit Case Nos. 02-35263 and 02-35841:** Providence filed appeals in the Ninth Circuit from the adverse district court judgments under 28 USC § 1291. The Ninth Circuit consolidated the two appeals.

B. Statement of Material Facts and Proceedings Below [SCR 14(g)]

1. Statement of Facts

In February 2000, the McDowells were severely injured in a car accident by a third party in the State of Washington and had to be treated for their injuries.

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[1] Defendants McDowell contended that any alleged state law claim was completely pre-empted under 29 USC §1144(a).

Complaint in *McDowell I*, App: G-2. The McDowells first exhausted their personal injury protection (PIP) benefits under their auto policy, and then submitted their remaining medical expenses for payment under the terms of Providence's group health plan (issued to Mr. McDowell's employer). Affidavit of Gary McDowell, p. 2, Clerk's Record ("CR") #16.[2] In February 2001, the McDowells settled their third-party personal injury claims. At that time, Providence asserted a right to reimbursement under the plan for "$21,727.55" for medical bills paid. Complaint in *McDowell I*, App: G-3-4. The McDowells made an offer in compromise, but Providence rejected it and demanded payment in full. Complaint in *McDowell I*, App: G-4; McDowell Aff., p. 2, CR:16. Providence thereafter filed its first action, *McDowell I*, in state court for breach of contract, and later the second action, *McDowell II*, in federal district court. Complaint in *McDowell I*, App: G-1-6; Complaint in *McDowell II*, App: H-1-7.

Providence is a health care service contractor which issued a group health plan to defendant Gary McDowell's employer, Wah Chang. Complaint in *McDowell I*, App: G-1-2. Prior to Providence, Wah Chang contracted with a

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[2] Providence initially refused to pay any medical bills unless the McDowells signed "trust" agreements. McDowell Aff, p. 2, CR:16. The district court held that the trust agreements (or "directives," as the district court described them) were not enforceable because, *inter alia*, they lacked consideration since Providence was already obligated to pay benefits. Opinion and Order, footnote 1, App: E-3. Providence did not assign error to, or challenge, the district court's ruling in that regard. Providence's Opening Brief in the Ninth Circuit.

company called SelectCare Health Plans to provide medical benefits for its employees. Complaint in *McDowell I*, App: G-2. Providence apparently acquired SelectCare Health Plans, and then unilaterally issued its own form of plan to Wah Chang. Complaint in *McDowell I*, App: G-2. Providence did not request, nor did the McDowells sign, a form of application for coverage under Providence's plan. McDowell Aff., p.2, CR:16.

Plaintiff Providence is an ERISA-plan fiduciary, and its plan is governed by ERISA. Complaint in *McDowell II*, App: H-1-2. Gary McDowell, as an employee of Wah Chang, is a plan participant, and his wife, Roselea McDowell, is a plan beneficiary. Complaint in *McDowell I*, App: G-2, Complaint in *McDowell II*, App: H-2. The McDowells did not participate in any negotiations (if any occurred) about the terms of the group health plan, and there is no evidence that Wah Chang negotiated any terms of the plan (and certainly not the reimbursement terms labeled "Third Party Liability/ Subrogation"). The McDowells are third party beneficiaries of the group health plan. *Fireman's Ins. v. Motors Ins.*, 245 Or 601, 604-605, 423 P2d 754 (1966) (a contract of insurance is a third party beneficiary contract "if it appears... that the purpose of the person securing the insurance was to benefit, at least in part, someone in addition to, or other than, himself"). The reimbursement term of the plan provides:

> 11.2 Proceeds of Settlement or Recovery. **Providence Health Plan** shall be entitled to the proceeds of any settlement, whether or not responsibility is accepted or denied by the third party for the condition, or any judgment that results in a recovery from a third party, up to the amount of benefits paid by **Providence Health Plan** for the condition, less a proportionate share of reasonable attorney fees, whether such benefits are paid by **Providence Health Plan** before or after the settlement or recovery. Prior to accepting any settlement, the Member shall notify **Providence Health Plan** in writing of any terms or conditions offered in settlement, and shall notify the third party of **Providence Health Plan's** interest in the settlement established by this provision. Group Health Plan, paragraph 11.2, p.42, Exhibit 2 to Providence's Complaint, CR:2.

2. Statement of Proceedings

Providence appealed from two adverse district court decisions in actions Providence filed consecutively against Gary and Roselea McDowell for reimbursement of amounts paid for their medical expenses. In *McDowell I*, Providence brought a claim for reimbursement in state court based on paragraph 11.2 of the plan (quoted above). The McDowells removed *McDowell I* to federal court, and moved to dismiss Providence's claims on the ground that ERISA preempted Providence's claim. Providence moved to remand. The district court denied Providence's motion to remand, and granted the McDowells' motion to dismiss. District Court

Opinion and Order, App: E-1-7. After *McDowell I* was dismissed, Providence filed *McDowell II* in federal court and asked for "equitable relief" under § 1132 for reimbursement of amounts paid, relying on the same reimbursement language in the plan. The district court in *McDowell II* held that Providence's claim for "equitable relief" was merely a disguised action for monetary damages, and dismissed *McDowell II* pursuant to *Great West Life & Annuity Ins. Co. v. Knudson*, 534 US 204, 122 S Ct 708, 151 LEd2d 635 (2002). District Court Order, App: F-1-7.

The Ninth Circuit panel affirmed the decision in *McDowell II*, but the panel reversed the decision in *McDowell I*, and remanded the case to state court. 385 F2d 1168, App: A-1-13.

V. REASONS WHY THIS COURT SHOULD GRANT CERTIORARI

The panel's decision in *Providence Health Plan v. McDowell*, 361 F3d 1243 (9th Cir 2004), as amended, 385 F3d 1168 (9th Cir. 2004), is a decision in the two consolidated appeals, *McDowell I* and *McDowell II*. Petitioner does not take issue with the panel's decision in *McDowell II*. Petitioner does take issue with the decision in *McDowell I*. Petitioner requests that this court grant certiorari in respect of *McDowell I*. The reasons are stated below.

Question No. 1

First, ERISA established a uniform system of federal laws to govern health care and pension benefit plans. The panel concluded that Providence's alleged "state law" claim

for reimbursement was not preempted and did not fall within the scope of ERISA's civil enforcement provision, 29 USC § 1132 (hereinafter, "§ 1132"). That decision conflicts with the Supreme Court's decision in *Pilot Life Ins. Co. v. Dedeaux*,481 US 41, 107 S Ct 1549, 95 L Ed 2d 39 (1987), and decisions of the circuits, namely:

1. *Cement Masons Health and Welfare Trust Fund v. Stone*, 197 F3d 1103 (9th Cir 1999);
2. *FMC Medical Plan v. Owens*, 122 F3d 1258 (9th Cir 1997);
3. *Honolulu Joint App. & Train. Comm. v. Local Union No. 675*, 332 F3d 1234 (9th Cir 2003);
4. *Pacificare v. Martin*, 34 F3d 834 (9th Cir 1994);
5. *Reynolds Metals v. Ellis*, 202 F3d 1246 (9th Cir 2000);
6. *Westaff v. Arce*, 298 F3d 1164 (9th Cir 2002);
7. *Cooperative Benefit Adm. v. Ogden*, 367 F3d 323 (5th Cir 2004);
8. *Bauhaus v. Copeland*, 292 F3d 439 (5th Cir 2002);
9. *Qualchoice, Inc. v. Rowland*, 367 F3d 638 (6th Cir 2004);
10. *Community Health Plan v. Mosser*, 347 F3d 619 (6th Cir 2003);
11. *Primax Recoveries v. Sevilla*, 324 F3d 544 (7th Cir 2003).

These circuit cases hold that an action by a plan fiduciary for reimbursement is preempted and precluded.[3] As a result, this case presents questions of exceptional importance because the decision threatens to undermine Congress' intent to create a uniform scheme of remedies governing enforcement of ERISA's plans.

In addition, the panel's decision conflicts with *Great West Life & Annuity Ins. Co. v. Knudson*, 524 US 204, 122 SCt 708, 151 LEd2d 635 (2002). In that case, this Court held that a fiduciary's claim for reimbursement, which the fiduciary attempted to characterize as an "equitable claim," was a legal claim for breach of contract, and was foreclosed by ERISA. In so doing, this Court reaffirmed its holding in *Mertens v. Hewitt Assoc.*, 508 US 248, 113 SCt 2063, 124 LEd2d 161 (1993), and stated that while Congress had authorized a participant or beneficiary to enforce rights under the plan, whether the relief sought was legal or equitable, Congress had not extended the same authorization to fiduciaries, but rather had provided that fiduciaries have claims for equitable relief only. *Great West*, 534 US 220-221. In response to plaintiff's contention in *Mertens* that such a construction left plaintiff with less protection than existed before ERISA, this court stated that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to

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[3] In three of the cases, *FMC Medical Plan v. Owens, Cement Masons Health and Welfare Trust fund v. Stone,* and *Westaff v. Arce*, the plan brought an action on the plan and on agreements which the plan forced the members to sign, as the plan did in the instant case, after the member was injured and before the plan would pay benefits.

overcome the words of its text regarding the *specific* issue under consideration." *Mertens*, 508 US 261. The panel's decision in *McDowell I* is even inconsistent with its decision in *McDowell II*, because in both cases Providence was acting in the same role; i.e., as a fiduciary. And, since Providence is a plan fiduciary, ERISA dictates the types of claims Providence may bring against a plan participant or beneficiary. These are set forth in §1132(a), and a claim for legal relief is not one of them. *Great-West v. Knudson*, *supra*.[4]

Further, more recently, this Court unanimously decided *Aetna Health, Inc. v. Davila*, ___ US ___, 124 SCt 2488, 159 LEd2d 312 (2004), reaffirming its earlier decision in *Pilot Life Ins. Co. v. Dedeaux* 481 US 41, 107 SCt 1549, 95 LEd2d 39 (1987). In *Davila*, this Court rejected any attempt by state law to supplement the civil enforcement scheme of 29 USC §1132. In reversing the Fifth Circuit, the Supreme Court stated that any attempt to distinguish preempted from non-preempted claims based on a particular label affixed to the claims ("contract" v. "tort") would "elevate form over substance and allow parties to evade" the preemptive scope of ERISA. 124 SCt 2498. The panel in *McDowell* did not even mention *Davila*, even though this

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[4] In *McDowell I*, the panel held that Providence's legal claim for breach of an express reimbursement clause in the policy is not related to the plan. In *McDowell II*, the panel held that a claim on the plan for equitable relief (specific performance) was preempted and precluded by ERISA. If the latter claim is governed by ERISA, then, *a priori*, the claim must relate to the plan (otherwise, ERISA would not apply). There is no way to reconcile the panel's conflicting logic in the two appeals.

Court decided *Davila* before the panel amended its opinion and filed it on October 1, 2004. The panel's amended opinion conflicts with this Court's holding in *Davila*.

Second, the panel's decision in *McDowell I* conflicts with the Supreme Court's decision in *Metropolitan Life Ins. Co. v. Taylor*, 481 US 58, 107 S Ct 1542, 95 LEd2d 55 (1987), and the decisions of several circuit courts, namely:

1. *Clorox v. US Dist Ct for N.D. of Cal.*, 779 F2d 517 (9th Cir 1985);
2. *Engelhardt v. Paul Revere Life Ins. Co.*, 139 F3d 1346 (11th Cir 1998);
3. *Jass v. Prudential Health Care Plan, Ins.*, 88 F3d 1482 (7th Cir 1996);
4. *McCoy v. Mass. Inst. of Tech.*, 950 F2d 13 (1st Cir 1991);
5. *Shea v. Esensten*, 107 F3d 625 (8th Cir 1997).

These cases hold that an action filed in state court to enforce the terms of an ERISA plan is completely preempted by federal law, and is therefore removable.

Question No. 2.

The panel apparently believed that this Court left open in *Great West* the question of whether a fiduciary could sue a plan member for reimbursement. Petitioners do not believe this Court left that door open but, rather, left the door open for a fiduciary to sue a third party. Nevertheless, petitioner requests that this Court resolve this issue once and for all.

VI. ARGUMENT

Introduction

The panel held in *McDowell I* that the district court lacked removal jurisdiction because Providence's claim for reimbursement was not preempted under § 1144 and did not fall within the scope of § 1132(a). 385 F3d 1173, App: A-11. The panel then directed the district court to remand *McDowell I* to state court. The panel's decision is contrary to the law.

The result in this case should be dictated by the language of ERISA. 29 USC § 1144(a) provides that, with exceptions not here applicable, ERISA shall "supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan . . ." 29 USC § 1132(a)(3) provides that a civil action may be brought by a fiduciary:

> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter or the terms of the plan;

29 USC § 1132(e) provides that the district courts shall have **exclusive** jurisdiction of actions brought by a fiduciary. Thus, a fiduciary may bring a civil action to enforce the terms of a plan only under 29 USC § 1132(a)(3), and that section permits an action only if it is equitable. 29 USC § 1132(a)(3) does not permit Providence to bring a claim against the McDowells for reimbursement.

A. Providence's Claim for Breach of Contract Is Completely Preempted by ERISA and Removable (Question No. 1)

1. Providence's Claim Relates to the Health Care Plan

Pursuant to 29 USC § 1144(a), ERISA supersedes state laws that relate to an employee benefit plan governed by ERISA. 29 USC § 1144 (c) (1) defines state laws to include laws, decisions, rules, regulations or other *state action* having the effect of law. In *Pilot Life Ins. Co. v. Dedeaux*, 481 US 41, 107 S Ct 1549, 95 L Ed 2d 39 (1987), this Court held that state causes of action by an employee against a plan-insurer for improper processing of a disability claim were preempted because the causes of action *related to the plan*[5], even though the employee was left without his state law remedies because § 1132 did not authorize them. 481 US 52-57. This Court held the phrase "relate to" should be given its broad, common sense meaning so that a state law "relates" to a benefit plan if it has a connection with or reference to such a plan. 481 US 47:

> The deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that **ERISA's civil enforcement remedies**

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[5] Notably, the panel decision makes no mention of *Pilot Life*. *Pilot Life* is still good law, and was limited by the recent case of *Kentucky Association of Health Plans v. Miller*, 538 US 329, 123SCt 1471, 155 LE2d 468(2003), only to the extent that *Pilot Life* relied on the McCarran-Ferguson factors in defining the "business of insurance".

> **were intended to be exclusive**... The legislative history demonstrates that the preemptive force of § 502(a) was modeled after § 301 of LMRA. (emphasis added) 481 US 54[6].

The Ninth Circuit followed *Pilot Life Ins. Co.* in *Bast v. Prudential Ins. Co.,* 150 F3d 1003 (9th Cir 1998), where the appeals court held that an employee's claims against a plan administrator for bad faith and breach of fiduciary duty for failing to authorize benefits under a plan were preempted because §1132 would be undermined if litigants could invoke state remedies which Congress rejected, even if litigants are left without a remedy. 150 F3d 1007, 1009-1010. The Ninth Circuit held that the key issue was whether the parties' relationship was ERISA-governed:

> We agree with our sister circuits that ERISA preempts state law claims, even if the result is that a claimant, relegated to asserting a claim only under ERISA, is left without a remedy. The focus is on ERISA. If it does not provide a remedy, none exists. 150 F3d 1010.

The panel below relied instead on *New York State Conference of BlueCross & BlueShield Plans v. Travelers Ins. Co.,* 514 US 645, 115 S Ct 1671, 131 L Ed2d 695 (1995), to support its conclusion that Providence's claim did not relate to the plan. In that latter case, this Court held that state laws were not preempted which required hospitals to

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[6] This Court in *Pilot Life* relied on language from *Massachusetts Mutual life Insurance Co. v. Russell*, 473 US 134, 146, 87 L Ed 2d 96, 105 S Ct 3085 (1985), to the effect that Congress did not intend to authorize remedies other than those enumerated in §1132.

collect surcharges from patients insured by insurers and HMOs other than Blue Cross and Blue Shield. This Court said that state laws with an indirect economic effect on a plan did not "relate to" the plan. 514 US 659-662. Providence's state law claim for reimburse00ment in this case is not analogous to the New York surcharge law, but rather is a claim based on the express language of Providence's plan[7]. Providence's claim for reimbursement would not exist but for the express language of the plan. Providence specifically alleged in its complaint that "[u]nder the terms of paragraph 11.2 of the Group Contract [the reimbursement clause], defendants [McDowell] are obligated to repay Providence from any recovery..." Complaint in *McDowell I*, App: G-3. The panel quoted and relied on this language in its opinion. 386 F3d 1170, App: A-3. There is no common law right of reimbursement. *Milwaukie Mechanics' Ins. Co. v. Ramsey*, 76 Or 570, 576, 149 P542 (1915).[8] Providence had no right of reimbursement from its own insureds, the McDowells, in

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[7] This Court in *New York State Conference of BlueCross & BlueShield Plans v. Travelers Ins. Co.* acknowledged that ERISA preempts "state laws providing alternative enforcement mechanisms." 514 US 658. Providence's state claim for reimbursement is an alternative enforcement mechanism.

[8] An insurer has a common law right of subrogation against third-party tortfeasors after paying benefits to its insured (e.g., if an insurer pays for property destroyed by fire negligently caused by a third-party, the insurer is subrogated to the insured-owner's cause of action against the wrongdoer): *United Pacific Co. v. Schetky Equipment Co.*, 217 Or 422, 427, 342 P2d 766 (1959). But an insurer has no common law right of reimbursement from its own insured who has, after all, paid premiums for the right to receive benefits under the policy.

the absence of the plan language. Thus, when the panel states the claim does not "relate to" the plan, 386 F3d 1172, App: A-7, one must ask: Then what does it relate to? After all, Providence's claim in *McDowell I* was for breach of **contract**. Complaint, App: G-4-5. What contract? The Providence health care **plan contract**.

The panel stated "[b]ecause this is merely a claim for reimbursement based upon the third-party settlement, it does not `relate to' the plan," 386 F3d 1172, App: A-7, citing *Blue Cross of California v. Anesthesia Care*, 187 F3d 1045 (9th Cir 1999). In *Blue Cross of California*, physicians brought a lawsuit against Blue Cross for breach of physician fee agreements, and Blue Cross contended that the claims were preempted by ERISA because some patients had assigned to the physicians benefit payments due from the insurer. The Ninth Circuit held that the claims arose from the fee agreements between the physicians and Blue Cross, not agreements between Blue Cross and the patients (who were plan participants or beneficiaries), and ERISA did not govern the physicians agreements. 187 F3d 1050. In other words, the claims did not encroach on any relationship governed by ERISA. 187 F3d 1054.

In *General American Life Ins. Co. v. Castonguay*, 984 F2d 1518 (9th Cir 1993), the Ninth Circuit stated:

> The key to distinguishing between what ERISA preempts and what it does not lies, we believe, in recognizing that the statute comprehensively regulates certain relationships; for instance, the relationship between plan and plan member, between plan and

> employer, between employee and employer (to the extent an employee benefit plan is involved), and between plan and trustee (emphasis added). 984 F2d 1521.

Providence is a plan fiduciary. Providence made a claim for reimbursement against the McDowells, plan members,based on an express term of the plan. Providence's claim affects the relationship between the plan and the plan members. Its claim is therefore completely preempted.

2. Providence's Claim Falls within the Scope of § 1132

The panel also stated that Providence's claim for reimbursement "does not fall within ERISA's civil enforcement provision [§ 1132]." 386 F3d 1172, App: A-8. The panel stated "[h]ere, Providence is seeking ordinary damages-monetary relief based upon contractual remedies that arise under state law. Therefore, its claim is not within ERISA's civil enforcement provisions," citing *Abraham v. Norcal Waste System*, 265 F3d 811 (9th Cir 2001). *McDowell*, 385 F3d 1173, App: A-8. In *Abraham*, plaintiffs, former employee-shareholders, sued in state court an employee-owned company, the employee stock ownership plan, and others for conduct that occurred after a leveraged buyout. Plaintiffs alleged fraud, breach of contract, and other tort and quasi-contract claims (some plaintiffs who remained participants also brought suit in federal court alleging breach of duties imposed by ERISA). Defendants removed the state law claims to federal court. The Ninth Circuit held there was no preemption under § 1144(a) of ERISA because plaintiffs'

state law claims had nothing to do with plan benefits, or any duties imposed by ERISA. *Abraham*, 265 F3d 823-824. The Ninth Circuit in *Abraham* also noted that the financial relationship between the parties arose out of a transaction specifically exempted by ERISA (i.e., a leveraged buyout). The panel apparently believes that removal is dependent not only on Providence's claim "relating to" the plan, but also on the claim's "falling within the scope of § 1132." At page 1171, App: A-5, the panel cites *Metropolitan Life Ins. Co. v. Taylor*, 481 US 58, 107 SCt 1542, 95 LEd 2d 55 (1987), but the panel did not follow that decision. In *Metropolitan Life Ins. Co. v. Taylor*, an employee filed an action in state court against his employer and the ERISA insurer alleging common law contract and tort claims for failure to pay benefits, and defendants removed the action. This Court held that the action was properly removed because state causes of action for benefits "related to" the plan and were preempted. 481 US 62. Although plaintiff in *Taylor* took the position that the complaint asserted state law causes of action, this Court held the causes were necessarily federal in character, and were removable in spite of the "well-pleaded complaint" rule. 481 US 67.[9] This Court held in *Taylor* that when Congress enacted ERISA, Congress intended to convert all

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[9] The panel in *McDowell* also cited *Toumajian v. Frailey*, 135 F3d 648 (9th Cir 1998) to support its position. *McDowell*, 386 F3d 1171. *Toumajian* was an action by a client against his accountants for negligence in establishing a plan. On the facts of that case, the Ninth Circuit held that the client's malpractice action did not fall within the scope of § 1132 (and the case was not removable) because the client was not seeking to enforce a plan. 135 F3d 655-656.

state law causes of action into federal causes. 481 US 65.[10] Finally, this Court in *Taylor* held that state law causes of action for benefits were within the scope of § 1132, and must yield to the exclusive federal remedies set forth in that section. 481 US 62-63, 66. This Court did not state that removal was proper only if plaintiff's claim "fell within the scope" of § 1132. Rather, the Court held that claims relating to the plan **necessarily** fall within the scope of § 1132.[11] This Court in *Metropolitan Life Ins. Co. v. Taylor* did not discuss § 1132's "scope" as an additional requirement for removal. Rather, this Court in *Metropolitan Life Ins. Co. v. Taylor*, and in *Pilot Life*, discussed § 1132's exclusivity as additional proof that Congress intended that § 1132 displace all state law claims relating to a plan. *Pilot Life*, 481 US 52-57; *Metropolitan Life Ins. Co. v. Taylor*, 481US 66. In any event, the lesson of *Pilot Life* and *Metropolitan Life Ins. Co. v. Taylor* (which were both decided by this Court on the same day) is that any claim to enforce the plan falls within the scope of § 1132, which is the exclusive means of enforcing a plan. If § 1132 does not authorize Providence's claim in this case (and it does not), then no claim exists.

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[10] *Note Bene*: If this Court found that a tort claim relating to a plan was removable, then, *a fortiori,* a claim for breach of an express provision in the plan document would certainly be removable.

[11] In *Metropolitan Life Ins. Co. v. Taylor*, this Court relied on *Avco Corp. v. Machinists*, 390 US 557, 20 L Ed 2d 126, 88 S Ct 1235 (1968). *Taylor*, 481 US 64. *Avco Corp.* established the principle that the preemptive force of § 301 of the Labor Management Relations Act was so powerful that it displaces entirely any state causes of action for violation of collective bargaining agreements, and that any such causes of action are purely a creature of federal law.

B. This Court Did Not in *Great West* Contemplate That a Fiduciary Could Bring a State Law Claim for Reimbursement in State Court (Question No. 2)

The panel contends that this Court left open in *Great West* the question of whether a fiduciary's direct action asserting a state law claim for reimbursement against a plan member would be preempted. *McDowell*, 385 F3d 1173, App: A-8. While this Court may have left open the question of whether a fiduciary may bring an action in state court against a third-party tortfeasor, the McDowells do not believe that this Court contemplated that a fiduciary could make a state law claim against a plan member for legal damages.

The panel in *McDowell* recognizes that fiduciaries such as Providence could not invoke ERISA's equitable remedies to obtain reimbursement from their plan participants and beneficiaries, citing *FMC Medical Plan v. Owens*, 122 F3d 1258 (9th Cir 1997) and *Cement Masons Health & Welfare Trust Fund v. Stone*, 197 F3d 1003 (9th Cir 1999). *McDowell,* 385 F3d 1173, App: A-9.[12] But, the

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[12] The panel also relies on a 1997 footnote in *Owens* that stated:

> FMC [a plan fiduciary] will have to pursue its claims under the Plans in state court if it wishes to receive the reimbursement it is allegedly owed by Owens [a plan participant].

122 F3d 1262, n. 2. The quoted language appears on the same page as the conclusion in Owens that the district court was without subject matter jurisdiction. The footnote was dictum and appended to language subsequently disapproved by the Ninth Circuit two years later in *Cement Masons*, where the Ninth Circuit held that dismissal of a claim for reimbursement was a dismissal on the *merits*, not for want of subject matter jurisdiction. *Cement Masons*,

panel then relies on the holdings of *Cement Masons* and *Owens* to support its view that Providence can bring a state law claim for reimbursement. The fact that § 1132 does not authorize an equitable claim for reimbursement does not mean it authorizes a legal claim for reimbursement.[13] On the contrary, in *FMC Medical Plan v. Owens*, *supra*, *Cement Masons Health and Welfare Trust Fund v. Stone*, *supra*, *Reynolds Metals v. Ellis*, 202 F3d 1246 (9th Cir 2000), *Honolulu Joint App. & Train. Comm. v. Local Union No. 675*, 332 F3d 1234, 1237-1238 (9th Cir 2003), and *Westaff v. Arce*, 298 F3d 1164 (9th Cir 2002), the Ninth Circuit consistently held that actions brought by plan fiduciaries against plan beneficiaries (or participants) for reimbursement were preempted and precluded by ERISA. Only ten years ago, the Ninth Circuit held that a legal claim for reimbursement against a participant would not lie. *Pacific Care v. Martin*, 34 F3d 834, 837-838 (9th Cir 1994). The panel did not discuss this case or attempt to distinguish it. In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 US 204, 122 S Ct 708, 151 LEd2d 635 (2002), a case also arising out of the Ninth Circuit, Great-West, attempted to avoid the Ninth Circuit precedent by recharacterizing its breach of contract claim as an equitable claim under ERISA. This Court correctly closed that door.

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197 F3d 1008. The case of *Westaff v. Arce*, 298 F3d 1164 (9th Cir 2002), decided after *Cement Masons*, supports the holding of *Cement Masons*. See, *Westaff*, 298 F3d 1167.

[13] This was the argument that was specifically rejected by this Court in *Pilot Life Ins. Co. v. Dedeaux*, *supra*.

This Court in *Great West Life v. Knudson* stated that § 1132 did not authorize a claim that would impose personal liability on a plan member for reimbursement. 535 US 214. At page 1173, App: A-8, of the *McDowell* opinion, the panel quotes a portion of the dicta from this Court in *Great West.* That language is extracted from the following:

> We note, though it is not necessary to our decision, that there may have been other means for petitioners to obtain the essentially legal relief that they seek. We express no opinion as to whether petitioners could have intervened in the state-court tort action brought by respondents or whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would have been pre-empted by ERISA. 534 US at 220.

The panel does not discuss the language following the above dicta in which this court stated:

> We need not decide these issues because, as we explained in *Mertens* '[e]ven assuming . . . that petitioners are correct about the pre-emption of previously available state court actions' or the lack of other means to obtain relief, `vague notions of a statute's "basic purpose" are none the less inadequate to overcome the words of its text regarding the *specific* issue under consideration.' 534 US at 220.

Indeed, Providence had a remedy which ERISA would not bar, but Providence chose not to pursue that remedy. Providence could have filed a subrogation claim against the third-party tortfeasors who injured the

McDowells, or intervened in the McDowells' action against the third parties.[14] If Providence had pursued one of these remedies, it would have asserted a claim against third parties, not the McDowells. What Providence could not do was assert a claim for money damages against the McDowells, who were plan members.

Six active judges and one senior judge on the Ninth Circuit dissented from the Order Denying the McDowells' Petition for a Rehearing *en banc*. Dissenting opinion, App: C-1-5. The judges, in a dissenting opinion by Judge Thomas, stated:

> [The panel's] decision marks a profound change in ERISA law and a significant deviation from the Supreme Court and Ninth Circuit precedent.
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> . . .
>
> . . . until now, our circuit has taken a consistent view of ERISA preemption in the context of common law and equitable actions between ERISA plan participants and third party insurers. If the cause of action involves an ERISA-governed relationship, the parties are confined to the remedies prescribed by ERISA. **This case marks a radical departure from our precedent, allowing an ERISA insurer to pursue independent claims for reimbursement from the plan participant. This cannot be reconciled with our precedent, nor with the Supreme Court's ERISA decisions. Indeed, the Supreme Court's recent decision in *Aetna***

[14] The McDowells filed their action in Washington. Washington Civil Rule 24 provides for intervention.

> ***Health, Inc. v. Davila*** **(citation omitted) further bolters the opposite conclusion.**
>
> . . .
>
> The impact of this decision is to provide a special exemption for one party while handcuffing the other. (Emphasis added.) Dissenting opinion, 385 F3d 1175-1177, App: C-1-5.

The dissent noted that two state appellate courts, including Oregon, had ruled that ERISA preempted state law claims for reimbursement. Those cases are: *Liberty Northwest Ins. Corp. v. Kemp*, 192 Or App 181, 193-194, 85 P3d 871 (2004) and *Jefferson-Pilot Life Ins. Co. v. Krafka*, 50 Cal App 4th 190, 57 Cal Rptr 2d 723 (1996). The dissent noted that "we are now faced with the conundrum of federal courts in Oregon and California forced to allow state remedies and state courts in those areas holding those same remedies federally preempted." Dissenting opinion, 385 F3d 1176, App: C-4.[15]

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[15] Judge Brunetti, who wrote the opinion in *McDowell* for the panel, acknowledged that the panel's decision conflicted with the Oregon and California cases. He stated that the panel agreed with states that have found no ERISA preemption, citing one case, *Behavioral Sci. Inst. v. Great-West Life*, 84 Wn App 863, 930 P2d 933 (1997). *McDowell*, 385 F3d 1173, App: A-10. However, *Behavioral Sci. Inst.*. is distinguishable because that was an action by a self-insured employer against a stop-loss reinsurer for breach of contract and bad faith. That relationship is not ERISA governed.

CONCLUSION

Providence has asserted in briefs below that it should have a remedy against a plan member for reimbursement. The McDowells do not agree. As one ERISA commentator has noted:

> The concept of reimbursement or subrogation for medical expense claims has no support in ERISA's statutory scheme. It exists because it has been unilaterally implanted in plan documents. For certain plan members, the utilization of reimbursement has the effect of completely nullifying the coverage afforded under the plan. Unfortunately, this happens mainly in situations in which the plan beneficiary has encountered serious and debilitating physical injuries.

Roger M. Barron, *Public Policy Considerations Warranting Denial of Reimbursement to ERISA Plans: It's Time to Recognize the Elephant in the Courtroom*, 55 Mercer L Rev. 596, 633 (2004).

Further, the panel's decision in *McDowell* has already caused confusion in the federal courts of appeal. Another panel of the Ninth Circuit in *Carpenters Health v. Vonderharr*, 384 F3d 667 (9th Cir 2004) held that an ERISA trustee's action to enjoin distribution of settlement proceeds to plan participants was a legal action not cognizable under ERISA, but nevertheless remanded the case for reconsideration of whether the trustee's state law claims were preempted by ERISA in light of *McDowell*. Petitioners McDowell request that this Court grant *certiorari* and dispel the confusion by holding that ERISA completely preempts a

fiduciary's state law claims for reimbursement against a plan member (as opposed to a third party tortfeasor).

Respectfully submitted,

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APPENDIX

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APPENDIX A

On October 1, 2004, the Ninth Circuit, per Judges Brunetti, Graber and Nelson issued its AMENDED OPINION in two consolidated appeals, Ninth Circuit Case No. 02-35263 and 02-35841, as follows:

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Providence Health Plan, an Oregon non-profit corporation, *Plaintiff-Appellant* v. Gary McDowell; Roselea McDowell, *Defendants-Appellees*.
Case Nos. 02-35263 and 02-35841

[385 F3d 1168 (9th Cir 2004)]

Appeal from the United States District Court
For the District of Oregon
John Jelderks, Magistrate Judge, Presiding
Thomas M. Coffin, Magistrate Judge, Presiding

Argued and Submitted
December 5, 2003 – Seattle, Washington

Filed March 24, 2004
Amended October 1, 2004

Counsel
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Gordon T. Carey, Jr.
Portland, Oregon, for the Defendants-Appellees
Before: Melvin Brunetti, Thomas G. Nelson, and
Susan P. Graber, Circuit Judges

AMENDED OPINION

BRUNETTI, Circuit Judge:

These appeals concern two actions by Providence Health Plan to recover benefits paid to its insureds, the McDowells. The first action, "*McDowell I*," was for breach of contract and was filed in state court. *McDowell I* was removed to federal court and dismissed as completely preempted under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* The second action, "*McDowell II*," was filed in federal court as an action for equitable relief under ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). This action was also dismissed after the district court determined that Providence failed to state a claim under §1132(a).

For the following reasons, we reverse the dismissal of *McDowell I*, but affirm as to *McDowell II*.

BACKGROUND

In February of 1990, Gary McDowell applied for health coverage through SelectCare Health Plans, the health care insurance plan selected by his employer. Roselea McDowell, Gary's spouse, is covered under the same policy. The McDowells' policy was renewed every year thereafter with SelectCare and then, after SelectCare's 1997 merger with Providence, with both SelectCare and Providence. In

January of 2000, the insurance policy was issued only through Providence.

The McDowells' insurance contract with Providence contains the following reimbursement provision:

> Providence Health shall be entitled to the proceeds of any settlement, whether or not responsibility is accepted or denied by the third party for the condition, or any judgment that results in a recovery from a third party, up to the amount of benefits paid by Providence Health Plan for the condition, less a proportionate share of reasonable attorney fees, whether such benefits are paid by Providence Health Plan before or after the settlement or recovery.

On February 13, 2000, the McDowells were injured in an automobile accident. Providence paid benefits of $18,741.81 for Gary's medical care and $13,687.37 for Roselea's care.

On May 25, 2000, the McDowells each signed agreements directing their attorney to reimburse Providence for benefits paid in the event of any recovery from a third party.

The McDowells sued the driver of the vehicle that hit them as well as the driver's employer. In February of 2001, the McDowells received a settlement for approximately $500,000.

Following the settlement, Providence unsuccessfully sought reimbursement from the McDowells in the amount of

$21,727.55 under the insurance contract's reimbursement clause.

In October of 2001, Providence filed its first action against the McDowells in Linn County Circuit Court, alleging breach of contract. According to Providence, the McDowells agreed, in their insurance contract, that if they received money through any recovery action, they would reimburse Providence for the full value of benefits paid by Providence, less reasonable attorneys' fees. Providence contended that it was entitled to $21,727.55 pursuant to this provision.

The McDowells removed the contract action to federal court and filed a motion to dismiss, contending that the claim was preempted by ERISA. Providence filed a motion to remand.

On January 29, 2002, the district court denied the motion to remand and granted the McDowells' motion. The district court held that it had removal jurisdiction and that ERISA preemption barred Providence's claim.

In response to this dismissal, on April 12, 2002, Providence brought its second action in the United States District Court for the District of Oregon, this time under ERISA's civil enforcement provision, 29 U.S.C. § 1132(a). In this second case, Providence alleged that it was entitled to the equitable remedy of specific performance under § 1132(a)(3)(B) because it did not have an adequate legal remedy. Specifically, Providence sought an order mandating

the McDowells to specifically perform the reimbursement provision under the insurance contract.

On August 28, 2002, the district court dismissed this second action, concluding that Providence was in reality seeking monetary relief despite couching its request in equity.

Providence timely appealed both dismissals, and both are presently before this court.

DISCUSSION

A. Standard of Review

We review a dismissal under Federal Rule of Civil Procedure 12(b)(6) and a determination of subject matter jurisdiction de novo. *Homedics, Inc. v. Valley Forge Ins. Co.*, 315 F.3d 1135, 1138 (9th Cir. 2003); *FMC Med. Plan v. Owens*, 122 F.3d 1258, 1260 (9th Cir. 1997).

B. McDowell I

On appeal, Providence contends that the district court lacked removal jurisdiction over their breach of contract action.

[1] In order to be removable to federal court, a claim concerning a plan governed by ERISA must be preempted by ERISA and must fall within the scope of ERISA's enforcement provisions. *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-66 (1987); *see also*, *Toumajian v. Frailey*, 135 F.3d 648, 654 (9th Cir. 1998).

[2] ERISA's preemption provision, 29 U.S.C. § 1144(a), provides that ERISA's provisions shall generally "supersede any and all State laws insofar as they may now or

hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." While this section suggests that the phrase "relate to" should be read broadly, the Supreme Court has recently admonished that the term is to be read practically, with an eye toward the action's actual relationship to the subject plan. *See*, *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56 (1995) (stating that "infinite relations cannot be the measure of preemption" in construing "relate to").

[3] Generally speaking, a common law claim "relates to" an employee benefit plan governed by ERISA "if it has a connection with or reference to such a plan." *Id.* (internal quotation marks omitted); *see also*, *Blue Cross of Cal. v. Anesthesia Care Assocs. Med. Group, Inc.*, 187 F.3d 1045, 1052 (9th Cir. 1999).

[4] In evaluating whether a common law claim has "reference to" a plan governed by ERISA, the focus is whether the claim is premised on the existence of an ERISA plan, and whether the existence of the plan is essential to the claim's survival. If so, a sufficient "reference" exists to support preemption. *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 324-25 (1997) (citing *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 140 (1990)).

[5] In determining whether a claim has a "connection with" an employee benefit plan, courts in this circuit use a

relationship test. Specifically, the emphasis is on the genuine impact that the action has on a relationship governed by ERISA, such as the relationship between the plan and a participant. *See*, *Abraham v. Norcal Waste Sys., Inc.*, 265 F3d 811, 820-21 (9th Cir. 2001); *Blue Cross of Cal.*, 187 F3d at 1052-53.

[6] Here, the district court determined that the breach of contract action related to an ERISA plan because it sought the enforcement of a plan provision, the reimbursement provision. The district court erred in this respect because Providence's action for breach of contract does not have the requisite "connection with" or "reference to" an ERISA plan. Providence is simply attempting, through contract law, to enforce the reimbursement provision. Adjudication of its claim does not require interpreting the plan or dictate any sort of distribution of benefits. Providence has already paid ERISA benefits on behalf of the McDowells, and they are not disputing the correctness of the benefits paid. Rather, Providence claims that the McDowells have breached two promises: (a) the reimbursement provision incorporated into their ERISA plan, as it applies to monies paid to them by a non-ERISA third party, and (b) their agreement to direct their lawyer to reimburse Providence in the event of a settlement. Because this is merely a claim for reimbursement based upon the third-party settlement, it does not "relate to" the plan. *See, Blue Cross of Cal.*, 187 F3d at 1053-54 (holding action for reimbursement between insurers and medical providers

not preempted, in part because the claims did not require construction of the subject plan's terms).

[7] Also, Providence's breach of contract action fails the second requirement of removal jurisdiction because it does not fall within ERISA's civil enforcement provision, 29 U.S.C. §1132(a). As a fiduciary to the plan, Providence's only vehicle for relief in addressing violations or seeking enforcement of a plan is § 1132(a)(3). However, that section allows a fiduciary to seek only equitable relief for violation of the plan. Here, Providence is seeking ordinary damages — monetary relief — based upon contractual remedies that arise under state law. Therefore, its claim is not within ERISA's civil enforcement provisions. *Abraham*, 265 F3d at 824.

Our conclusion is further buttressed by a recent Supreme Court decision and prior decisions of this circuit dismissing ERISA actions brought by insurers for reimbursement of benefits.

[8] Most recently, in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 220 (2002), the Supreme Court concluded that § 1132(a)(3) did *not* authorize a fiduciary to enforce a reimbursement provision and acknowledged that other remedies outside ERISA might be available to the fiduciary. Further, the Court left open the issue that we decide today: "whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would [be] pre-empted by ERISA." *Id.*

Previous decisions of this circuit concerning reimbursement actions by insurers are also consistent with *Great-West* and foretold our decision with regard to such actions. *See, e.g.*, *Cement Masons Health & Welfare Trust Fund for N. Cal. v. Stone*, 197 F3d 1003, 1007 (9th Cir. 1999); *Owens*, 122 F3d at 1262 & n.2. In both cases, this court held that insurance companies could not look to ERISA's provisions allowing equitable relief to obtain reimbursement from their insureds. *See Cement Masons*, 197 F3d at 1007 (recognizing implicitly, in dismissing an insurance company's ERISA claim for equitable relief, that there may be other theories outside ERISA to seek relief from the insured); *Owens*, 122 F3d at 1262 & n.2 (dismissing insurer's claims for reimbursement under § 1132(a)(3), and specifying that "FMC will have to pursue its claims under the Plans in state court if it wishes to receive the reimbursement").

We are cognizant that our decision is in conflict with the decisions of some states. *See, e.g.*, *Liberty N.W. Ins. Corp. v. Kemp*, 85 P3d 871 (Or. Ct. App. 2004) (holding that insurer's action for reimbursement is preempted by ERISA); *Jefferson-Pilot Life Ins. Co. v. Krafka*, 57 Cal. Rptr. 2d 723 (Ct. App. 1996) (holding that insurer's action for reimbursement against insured "relates to" an ERISA plan). However, in light of our precedent and the Supreme Court's recent direction in *Great-West*, we cannot agree with these courts' construction of "relate to," and instead we agree with those states that have found no ERISA preemption. *See, e.g.*,

Behavioral Scis. Inst. v. Great-West Life, 930 P.2d 933 (Wash. Ct. App. 1997) (finding no preemption of action by self-insured employer against "stop-loss" reinsurer for breach of contract and bad faith where reinsurer denied stop-loss coverage of employee's medical treatment).

[9] Because Providence's breach of contract claim is not preempted under §1144 and does not fall within the scope of § 1132(a), the district court lacked removal jurisdiction, and the case must be remanded to state court.

C. McDowell II

Following dismissal of *McDowell I*, Providence brought a suit in federal court under 29 USC § 1132(a)(3) seeking specific performance of the reimbursement provision. The district court rejected Providence's "lawyerly inventiveness" and dismissed Providence's action, stating that "Plaintiff's ERISA action, brought 'in equity' but seeking monetary relief, cannot proceed."

For the following reasons, the district court is affirmed.

1. Claim Preclusion

[10] Claim preclusion bars any "lawsuits on 'any claims that were raised *or could have been raised*' in a prior action." *Stewart v. U.S. Bancorp*, 297 F3d 953, 956 (9th Cir. 2002) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F3d 708, 713 (9th Cir. 2001)). Claim preclusion applies if there is "'(1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties.'" *Id.* (quoting *Kaiser Found. Health Plan, Inc.*, 244 F3d at 713).

[11] All three requirements are met here. First, the two actions clearly involved the same parties disputing the same contractual provision. Additionally, a finding of preemption is a final judgment on the merits. *Id.* at 956-57 (holding that the plaintiffs' ERISA claims should have been brought in the previous state court litigation that was removed and dismissed for preemption, rather than in a subsequent federal proceeding).

[12] Accordingly, this action is barred under claim preclusion.

2. Failure to State ERISA Claim

[13] ERISA authorizes fiduciaries to bring suit in federal court for "appropriate equitable relief" to remedy violations of a plan or to enforce its provisions. 29 U.S.C. § 1132(a)(3)(B). In determining whether an action for equitable relief is properly brought under ERISA, courts evaluate "the 'substance of the remedy sought . . . rather than the label placed on that remedy.'" *Westaff (USA) Inc. v. Arce*, 298 F3d 1164, 1166 (9th Cir. 2002) (quoting *Watkins v. Westinghouse Hanford Co.*, 12 F3d 1517, 1528 n.5 (9th Cir. 1993)), *cert. denied*, 537 U.S. 1111(2003).

[14] The district court was correct in concluding that Providence's claim lay outside the scope of § 1132(a)(3). While Providence terms this an action in equity for specific performance, at bottom, Providence is simply attempting to enforce a contractual obligation for repayment. This is "a classic action at law and not an equitable claim." *Id.* As has been noted by this court before in the context of § 1132,

"[a]lthough they often dance around the word, what petitioners in fact seek is . . . monetary relief for all losses their plan sustained as a result of the alleged breach of the reimbursement provision." *Id.* (internal quotation marks omitted).

[15] As noted above, the Supreme Court in Great-West recently confirmed that the damages Providence seeks are unobtainable under ERISA's enforcement provision. In reaching this conclusion, the Court explained that, regardless of the chosen label, such monetary reimbursement constitutes legal rather than equitable relief:

> The basis for petitioners' claim is . . . that petitioners are contractually entitled to some funds for benefits that they conferred. The kind of restitution that petitioners seek, therefore, is not equitable—the imposition of a constructive trust or equitable lien on particular property—but legal—the imposition of personal liability for the benefits that they conferred upon respondents.

534 U.S. at 214.

In that passage, *Great-West* squarely resolves that Providence's claim for monetary damages against the McDowells is a claim for a legal remedy, despite Providence's attempt to disguise its claim in equitable clothes. *See also Westaff*, 298 F3d at 1166-67 (declining to construe fiduciary's claim for money damages held in escrow account as a claim for equitable relief under ERISA).

CONCLUSION

[16] For the foregoing reasons, we REVERSE the district court's dismissal of *McDowell I*, and remand with instructions to remand *McDowell I* to state court, and AFFIRM the district court's dismissal of *McDowell II*.

Costs are awarded to appellant Providence Health Plan.

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APPENDIX B

On the same date, The Ninth Circuit issued an ORDER as follows:

ORDER

The Panel has voted to deny appellees' petition for rehearing. Judge Graber has voted to deny the petition for rehearing en banc, and Judges Brunetti and T.G. Nelson so recommend.

The full court has been advised of the petition for rehearing en banc and an active judge has requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

No further petitions for rehearing or petitions for rehearing en banc may be filed.

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APPENDIX C

On the same date, October 1, 2004, six active judges and Judge Noonan, filed a DISSENTING OPINION as follows:

THOMAS, Circuit Judge, with whom PREGERSON, REINHARDT, HAWKINS, MCKEOWN, and BERZON, Circuit Judges join,[1] dissenting from the denial of rehearing en banc:

I respectfully dissent from the decision of the court not to rehear this case en banc. This decision marks a profound change in ERISA law and a significant deviation from Supreme Court and Ninth Circuit precedent. It is a harsh result that will be felt in human terms by subjecting plan participants to previously preempted lawsuits while denying them the concomitant right to assert their own claims based on the same plan document or insurance policy.

The Supreme Court has observed that "ERISA is a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system." *Great-West Life & Ann. Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) (internal quotation marks and citations omitted). As part of its expansive regulation of employee benefit plans, ERISA provides for a federal cause of action for civil claims to enforce the provisions of an ERISA plan. In so providing, "Congress's

[1] JUDGE NOONAN, who cannot qualify as a dissenter to the outcome, expresses his agreement with Judge Thomas.

primary goal was to replace the patchwork quilt of state law with a uniform body of federal law and to provide litigants with access to federal courts to enforce their newly created rights." Schneider and Freedman, ERISA: *A Comprehensive Guide* (2d. Ed. 2002), §8.01, p. 8-3. Thus, courts have construed extra-statutory remedies available under ERISA quite narrowly. As the Supreme Court has stated, "ERISA's carefully crafted and detailed enforcement scheme provides strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate directly." *Id.* (Internal quotation marks and citations omitted) (emphasis in original).

Indeed, "[w]e have repeatedly emphasized that 'ERISA contains one of the broadest preemption clauses ever enacted by Congress.'" *Security Life Ins. Co. of America v. Meyling*, 146 F3d 1184, 1188 (9th Cir. 1998) (quoting *Evans v. Safeco Life Ins. Co.*, 916 F.2d 1437, 1439 (9th Cir. 1990)). ERISA "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a). Thus, in a variety of contexts, we have held the ERISA preempts state statutory and common law actions filed by plan participants against third party insurers of ERISA plans. *See Elliot v. Fortis Benefits Ins. Co.*, 337 F3d 1138 (9th Cir. 2003); *Bast v. Prudential Ins.*, 150 F3d 1003, 1008 (9th Cir. 1998); *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F3d 812, 819 (9th Cir. 1992); *Tingey v. Pixley-Richards West, Inc.*, 953 F2d 1124, 1133

(9th Cir. 1992); *Kanne v. Conn. Gen. Life Ins. Co.*, 867 F2d 489, 493-94 (9th Cir. 1988).

On the other hand, we have also held that insurers' state common law and equitable reimbursement actions against plan participants were also preempted by ERISA. *See Westaff (USA), Inc. v. Arce*, 298 F3d 1164, 1167 (9th Cir 2002); *Reynolds Metals Co. v. Ellis*, 202 F3d 1246 (9th Cir 2000); *Cement Masons Health and Welfare Trust Fund for Northern California v. Stone*, 197 F3d 1003 (9th Cir 1999); *FMC Medical Plan v. Owens*, 122 F3d 1258 (9th Cir 1997).

Thus, until now, our circuit has taken a consistent view of ERISA preemption in the context of common law and equitable actions between ERISA plan participants and third party insurers. If the cause of action involves an ERISA-governed relationship, the parties are confined to the remedies prescribed by ERISA. This case marks a radical departure from our precedent, allowing an ERISA insurer to pursue independent claims for reimbursement from the plan participant. This cannot be reconciled with our precedent, nor with the Supreme Court's decisions. Indeed, the Supreme Court's recent decision in *Aetna Health Ins. v. Davila*, 124 S. Ct. 2488 (2004) further bolsters the opposite conclusion.

This holding is also inconsistent with state courts that have applied ERISA preemption to reimbursement claims. *See, e.g., Liberty N.W. Ins. Corp. v. Kemp*, 85 P3d 871 (Or. Ct. App. 2004) (holding that insurer's action for reimbursement is preempted by ERISA); *Jefferson-Pilot Life*

Ins. Co. v. Krafka, 57 Cal. Rptr. 2d 723 (Ct. App. 1996) (holding that insurer's action for reimbursement against insured "relates to" an ERISA plan). Thus, we are now faced with the conundrum of federal courts in Oregon and California forced to allow state remedies and state courts in those areas holding those same state remedies federally preempted.

As a practical matter, the decision destroys a level playing field and creates the incongruous consequences that insurers may sue plan participants for reimbursement based on provisions in the insurance contract, but that plan participants cannot file suits or counter-claims, against insurers for breach of contract or bad faith in claim administration under the contract. Thus, insurers are now insulated from tort liability for even the most egregious acts, while permitted to sue covered employees based on the same policy or plan. Such a result is incompatible with the theory and structure of ERISA, as construed by the Supreme Court. The idea of ERISA was to provide uniform federal law and procedure regarding covered employee benefit programs. To single out one party for a special exemption is antithetical to this concept and will produce harsh and anomalous results.

If we were considering ERISA preemption on a blank slate, our course might well have been different. If ERISA had been construed to allow plan participants to enforce their state common law and statutory rights outside the confines of ERISA remedies, the panel decision would be both logical and consistent. There are good arguments as to why the

entire scope and nature of ERISA preemption ought to be reexamined. As Justice Ginsburg has observed "a series of the Court's decisions has yielded a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief." *Aetna Health Inc.*, 124 S. Ct. at 2502 (Ginsburg, J., concurring).

However, we are not faced with a blank slate and the breadth of ERISA preemption is well-settled. The impact of this decision is to provide a special exemption for one party while handcuffing the other. Our court should have granted rehearing en banc to rectify this error.

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APPENDIX D

On March 24, 2004, the same panel issued its original OPINION in the consolidated appeals. It is reported at 361 F3d 1243. The original Opinion differs from the Amended Opinion only in that the Amended Opinion includes one additional paragraph as follows:

We are cognizant that our decision is in conflict with the decisions of some states. *See, e.g., Liberty N.W. Ins. Corp. v. Kemp*, 85 P3d 871 (Or. Ct. App. 2004) (holding that insurer's action for reimbursement is preempted by ERISA); *Jefferson-Pilot Life Ins. Co. v. Krafka*, 57 Cal. Rptr. 2d 723 (Ct. App. 1996) (holding that insurer's action for reimbursement against insured "relates to" an ERISA plan). However, in light of our precedent and the Supreme Court's recent direction in *Great-West*, we cannot agree with these courts' construction of "relate to," and instead we agree with those states that have found no ERISA preemption. *See, e.g., Behavioral Scis. Inst. v. Great-West Life*, 930 P.2d 933 (Wash. Ct. App. 1997) (finding no preemption of action by self-insured employer against "stop-loss" reinsurer for breach of contract and bad faith where reinsurer denied stop-loss coverage of employee's medical treatment).

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APPENDIX E

The Ninth Circuit Case No. 02-35201 was an appeal from a judgment in United State District Court Case No. 01-1704-JE. On January 24, 2002, Magistrate Judge Jelderks issued his OPINION AND ORDER in the United States District Court in that case (*McDowell I*) as follows:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Providence Health Plan, an Oregon nonprofit corporation, *Plaintiff*, v. Gary McDowell and Roselea McDowell, *Defendants*.

USDC Case No. 01-1704-JE

Opinion and Order

JELDERKS, Magistrate Judge:

Plaintiff Providence Health Plan (Providence) brings this action against defendants Gary and Roselea McDowell (the McDowells). Providence's motion to remand this matter to state court, and for an award of attorney fees, is denied. The McDowells' motion to dismiss this action with prejudice is granted.

BACKGROUND

Defendant Gary McDowell obtained Providence health care group insurance coverage through his employer. The policy also covered McDowell's wife, defendant Roselea McDowell. The McDowells were injured in an automobile

accident. Providence represents that it paid $32,429.18 for their medical care.

Paragraph 11.2 of the group insurance policy provides that, in the event of a settlement, the insured must reimburse Providence for the benefits furnished. The McDowells executed a directive to their attorney authorizing him to make the required payments in the event of a settlement. The McDowells' personal injury claims eventually did settle, and their attorney tendered a check to Providence, which tender was rejected as insufficient. The Complaint does not state the amount of the tender, but Providence contends that it "is entitled to recover $21,727.55 from defendants."

Providence brought an action in state court, claiming breach of the group insurance contract (i.e., the ERISA Plan) and also breach of a contract between the McDowells and their attorney (i.e., the directive). Providence also sought prejudgment interest, as well as attorney fees under the group insurance contract.

The McDowells removed this action to federal court, citing ERISA preemption, and then moved to dismiss the action. Providence responded that this is not an ERISA case, or at least it is not completely preempted, and then moved to remand the case to state court.

DISCUSSION

In *Great-West Life & Annuity Ins. Co. v. Knudson*, _____US _____, 2002 WL 15399 (Jan 8, 2002), a case almost precisely on point, the United States Supreme Court held (5-4) that § 502(a)(3) of ERISA does not authorize a

claim for reimbursement under these circumstances. It is, in essence, a claim for damages, and ERISA does not authorize a claim for damages by a person in the position of Providence. ERISA does authorize equitable relief, but the Court declined to characterize a claim for contractual reimbursement as a claim for equitable relief. With that issue settled, the remaining questions before this court are (1) whether ERISA, though not furnishing a remedy, nevertheless preempts a state law contract claim for reimbursement, and (2) whether this court has subject matter jurisdiction to decide that question.

"It is with great trepidation that we tread into the field of ERISA preemption . . . [a subject] that has bedeviled the Supreme Court." *Dishman v. Unum Life Ins. Co. of America*, 269 F3d 974, 980 (9th Cir 2001). ERISA "supersede[s] any and all state laws insofar as they . . . relate to any employee benefit plan." 29 USC § 1144(a). For purposes of § 1144(a), the term "state laws" includes state law claims for breach of contract.

Providence seeks to enforce the terms of the employee benefit plan. Whatever the outer limits of ERISA preemption, I see no way to avoid the conclusion that an action to enforce the provisions of an employee benefit plan is a claim relating to an employee benefit plan.[1] It is

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[1] I reject Providence's contention that the "directive" is an independent contract that may be enforced without reference to the employee benefit plan. Providence is not a signatory to the directive (which is between the McDowells and their attorney), nor was there new consideration. Providence was already obligated to furnish health care benefits under the

regrettable that, in the wake of *Knudson*, Providence may be left without a remedy, but that does not alter this conclusion. *See, e.g., Bast v. Prudential Ins. Co. of America*, 150 F3d 1003, 1009-10 (9th Cir 1998) (claim for bad faith delay in providing health care benefits, which resulted in the death of the insured, is preempted by ERISA, notwithstanding that it leaves the plaintiff with no remedy), *cert. denied*, 528 US 870 (1999).

I am not persuaded by Providence's arguments that the state law claim is a state law regulating insurance that is preserved by ERISA's savings clause, or that ERISA preemption applies to .claims brought by beneficiaries against the Plan, but not vice versa, or that ERISA preemption does not apply because Providence is suing in its capacity as an insurer and not as a fiduciary.

Providence also argues that, even if its state law claims are preempted, they are not "completely preempted,"hence this court lacks subject matter jurisdiction. I disagree.

Ordinarily, a "federal defense" is insufficient to confer federal question jurisdiction. *ARCO Environmental Remediation, LLC v. Montana Dept of Health & Env. Quality*, 213 F3d 1108, 1113 (9th Cir 2000). "[A] case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is

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existing contract, and the McDowells were already obligated to reimburse Providence.

the only question truly at issue in the case." *Franchise Tax Bd. of California v. Construction Laborers Vacation Trust for S. California*, 463 US 1, 14 (1983). "[T]he existence of federal jurisdiction depends solely on the plaintiff's claims for relief and not on anticipated defenses to those claims." *ARCO*, 213 F3d at 1113.

A narrow exception to the general rule is the doctrine of "complete preemption," by which Congress may so completely preempt a particular field that any complaint raising claims in that field is necessarily federal in nature. ERISA is such a statute. *See, Metropolitan Life Ins. Co. v. Taylor*, 481 US 58, 65-66 (1987). "ERISA's preemptive provision is so complete that an ERISA preemption defense provides a sufficient basis for removal . . . notwithstanding the traditional limitation imposed by the 'well-pleaded complaint' rule." *Geweke Ford v. St. Joseph's Omni Preferred Care Inc.*, 130 F3d 1355, 1358 (9th Cir 1997) (citations and quotation marks omitted). Either Providence has an ERISA claim, or else it has no claim. There is no room for a state law claim in this circumstance.

The claims here are within the general scope of ERISA's enforcement procedures. The fact that the remedy the plaintiff seeks is unavailable, or that the plaintiff cannot prevail on the facts of the particular case, does not mean that the court lacks subject matter jurisdiction. *See Cement Masons Health and Welfare Trust Fund for Northern California v. Stone*, 197 F3d 1003, 1007-08 (9th Cir 1999)

(on similar facts, dismissing on the merits rather than lack of jurisdiction).

In *FMC Medical Plan v. Owens*, 122 F3d 1258, 1262 (9th Cir 1997), a Ninth Circuit panel did state that because "FMC's claim is not cognizable under section 1132(a) (3) . . . the district court was without subject matter jurisdiction to entertain this claim." However, the Ninth Circuit subsequently disavowed that statement in *Cement Masons*, 179 F3d at 1007-08, and the latter analysis appears to be the better reasoned.

There also is dictum in a footnote in *FMC Medical Plan*, 122 F3d at 1262, n 2, which suggests that the insurer can simply go to state court. ("FMC will have to pursue its claims under the Plans in state court if it wishes to receive the reimbursement it is allegedly owed by Owens.") However, this was part of the paragraph that has since been disavowed, and is dictum as well. In its reply brief, Providence suggests that the US Supreme Court endorsed this dictum in *Knudson*, but a careful reading of the case reveals that the Supreme Court simply declined to express an opinion on a question not properly before the Court. The Supreme Court did not preclude the possibility that there might be some other procedural mechanism by which an insurer could protect its rights, but Providence has not demonstrated that the present action is such a mechanism.

As a practical matter, a remand would be pointless here since the state court would have little choice but to conclude that all of Providence's claims are preempted. This

is not a case in which federal preemption of one claim is cited as justification for removing the entire case to federal court, and something would remain for the state court to try even if it concluded that a part of the case was preempted. Either this court dismisses the action, or else the state court will have to do it, but the end result will be the same unless Congress amends the law and makes that amendment applicable to all pending cases. Although I am sympathetic to Providence's position, the law (as interpreted by the United States Supreme Court and the Ninth Circuit Court of Appeals) permits no other result here.

Having concluded that this action was properly removed, I deny Providence's request for an award of attorney fees pursuant to 28 USC §1447(c).

CONCLUSION

Providence's motion (#6) to remand is DENIED, as is Providence's request for an award of attorney fees. The McDowells' motion (#4) to dismiss is GRANTED, and the action is dismissed with prejudice.

DATED this 29th day of January, 2002.

/s/ John Jelderks

US Magistrate Judge

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APPENDIX F

The Ninth Circuit Case No. 02-35841 is an appeal from a judgment in the United States District Court Case No. 02-6110-TC. On August 28, 2002, Thomas M. Coffin, Magistrate Judge, issued his ORDER in the United States District Court in that case as follows:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Providence Health Plan, an Oregon corporation, *Plaintiff*, v. Gary and Roselea McDowell *Defendants*.

ORDER

COFFIN, Magistrate Judge:

This action represents plaintiff 's second attempt to obtain reimbursement from defendants of funds they claim are owed to them related to medical expenses stemming from an automobile accident. Judge Jelderks of this court has previously dismissed an action at law seeking damages in the amount in controversy, finding that the nature of the action was impermissible due to ERISA preemption. Plaintiffs have now filed a second action, this time characterizing it as a suit in equity brought under ERISA. Presently before the court are defendants' motion to dismiss (#5) and plaintiff's motion for summary judgment (#7).

STANDARD OF REVIEW

Pursuant to Fed. R. Civ. P. 12(b), a complaint may be dismissed on the basis of the pleadings if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Tanner v. Heise*, 879 F2d 572, 576 (9th Cir. 1989) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In making this determination upon a motion to dismiss, this court accepts all allegations of material fact as true and construes the allegations in the light most favorable to the nonmoving party. *Id.*

DISCUSSION

The facts of this case do not affect the court's analysis and were reported in Judge Jelderk's earlier opinion, so they need not be repeated in detail here. Suffice it to say that defendants were insured beneficiaries of a health care plan offered by plaintiff when they were involved in an automobile accident. Plaintiff paid certain benefits to defendants, but after defendants obtained a recovery from the other party involved in the accident, plaintiff asserted that it was entitled to a certain amount of the recovery by way of reimbursement, pursuant to the insurance agreement.[1] After rejecting an offer of compromise, plaintiffs filed their first suit against defendants. That action, a state law action removed to federal court, was dismissed because the court

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[1] Plaintiff also had defendants sign a directive to their attorney that the attorney would earmark recovered funds for payment to plaintiff.

found that such actions were preempted by ERISA and ERISA did not provide the remedy sought by plaintiff.[2]

In this second action, plaintiff has specifically invoked ERISA, and now characterizes this suit as equitable in nature, pursuant to Section 502(a)(3) of ERISA.[3] Instead of seeking "money damages", plaintiff purportedly seeks an order requiring specific performance and an injunction, to the effect that defendants would be required to pay the amount in controversy to plaintiff.

This is not the first time such "lawyerly inventiveness" has been seen in this sort of case. Indeed, just last term, the United States Supreme Court heard the case of *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708 (2002), which involved very similar facts. In *Great-West*, the defendant had received benefits from the plaintiff insurance company after sustaining injuries in an automobile accident. The insurance agreement at issue had a reimbursement provision that entitled plaintiff to recover any payment for benefits paid to the defendant from a third party, not to exceed the amount paid by the plaintiff. Ultimately, the defendant did recover for her injuries from a third party, and Great-West thereafter filed a action in U.S.

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[2]2 That opinion is currently being appealed to the Ninth Circuit.

[3]3 Codified at 29 USC § 1132(a)(3), and stating that: "A civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subshapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter of the terms of the plan[.]

District Court, seeking injunctive and declaratory relief under Section 502 (a) (3) of ERISA.

The Court, in a thorough analysis, identified the suit as being an action at law disguised as an action in equity:

> Here, petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money - relief that was not typically available in equity. "A claim for money due and owing under a contract is `quintessentially an action at law.'" *Wal-Mart Stores, Inc. v. Wells*, 213 F3d 398, 401 (7th Cir. 2000) (Posner, J.). "Almost invariably . . . suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty." *Bowen v. Massachusetts*, 487 US 879, 918-919 (1988) (Scalia, J., dissenting). And "[m]oney damages are, of course, the classic form of *legal* relief." *Mertens [v. Hewitt Associates*, 508 US 248 (1993)] at 255. Nevertheless, petitioners, along with their *amicus* the United States, struggle to characterize the relief sought as "equitable" under the standard set in *Mertens*. We are not persuaded.

Great-West, 122 S.Ct. at 712-713. The Court, after evaluating the various theories under which the plaintiff could be seen as proceeding in equity, discarded each one as disingenuous or otherwise inappropriate. The Court concluded:

> Congress authorized "a participant or beneficiary" to bring a civil action "to enforce his rights under the terms of the plan," without reference to whether the relief sought is legal or equitable. 29 USC § 1132(a)(1)(B). But Congress did not extend the same authorization to fiduciaries. Rather, § 502(a)(3), by its terms, only allows for *equitable* relief. We will not attempt to adjust the "carefully crafted and detailed enforcement scheme" embodied in the text that Congress has adopted. *Mertens*, *supra*, at 254. Because petitioners are seeking legal relief--the imposition of personal liability on respondents for a contractual obligation to pay money--§ 502(a)(3) does not authorize this action.

Id. at 718-719.

Great-West appears to be dispositive; the underlying facts are very similar to those in the instant case, and the legal theory used by Great-West is essentially identical to that proffered by plaintiff here. Plaintiff attempts to maneuver its case outside of *Great-West*'s scope, however, by arguing that in *Great-West* the Court was not faced with a case where the plaintiff has already been denied a remedy at law.[4] The linchpin of plaintiff's argument is based on a brief passage in the Court's opinion:

> We note, though it is not necessary to our decision, that there may have been other

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[4]4 Plaintiff argues, and the court assumes, *arguendo*, that as a result of Judge Jelderk's opinion, it has been left with no available remedy at law.

> means for petitioners to obtain the essentially legal relief that they seek. We express no opinion as to whether petitioners could have intervened in the state-court tort action brought by respondents or whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would have been pre-empted by ERISA. Nor do we decide whether petitioners could have obtained equitable relief against respondents' attorney and the trustee of the Special Needs Trust, since petitioners did not appeal the District Court's denial of their motion to amend their complaint to add these individuals as codefendants.

Great-West, 122 S. Ct. at 718. Plaintiff places emphasis on the clause "there may have been other means for petitioners to obtain the essentially legal relief that they seek." Thus, plaintiff argues, the Court was not faced with a situation in which traditional equitable relief would be warranted, because plaintiff Great-West may have had a remedy at law. However, this ignores the earlier clause "though it is not necessary to our decision." The Court did not base its opinion on the idea that Great-West may have had a remedy at law, and that therefore equity was unwarranted. If it had, the possibility of a remedy at law would have been central to its decision, as opposed to "not necessary." Rather, the Court was quite clearly stating that whether plaintiff had a separate remedy at law was immaterial -- Congress had not intended to allow fiduciaries to bring the type of "money damages" actions that Great-West had brought, and whether

characterized as an action at law or in equity, such actions could not stand.

Great-West controls this court's decision. Plaintiff's ERISA action, brought "in equity" but seeking monetary relief, cannot proceed. As such, defendants' motion to dismiss must be granted.

As did Judge Jelderks, the court notes the difficult situation which plaintiff and those similarly situated now face. Actions at law are preempted by the existence of ERISA, and actions in equity seeking money damages for reimbursement are foreclosed by ERISA's terms. It may be that in situations like the one presented here, health insurers will have to seek recovery of its expenses directly from the third party, as do companies offering other types of insurance, by subrogating the insured's claims. For the moment, however, as it relates to the claim presently before the court, the parties are urged to seek consolidation of this case with the earlier action presently on appeal, to enable the appellate courts to consider the issues presented as a whole.

CONCLUSION

Based on the controlling case of *Great-West Life & Annuity Insurance Co. v. Knudson*, plaintiff's case cannot stand. Defendants' motion to dismiss (#5) is granted. Plaintiff's motion for summary judgment (#7) is denied as moot.

DATED this 28th of August, 2002.

/s/ Thomas M. Coffin
US Magistrate Judge

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APPENDIX G

On October 18, 2001, plaintiff Providence Health Plan filed a COMPLAINT in Linn County Circuit Court, Case No. 01-2087, in McDowell I. Defendants removed the COMPLAINT to the United States District Court for the District of Oregon in Case No. 01-1704-JE. The COMPLAINT read as follows:

IN THE CIRCUIT COURT
OF THE STATE OF OREGON
FOR THE COUNTY OF LINN

Providence Health Plan, an Oregon nonprofit corporation, *Plaintiff*, v. Gary McDowell and Roselea McDowell, *Defendants*.

USDC Case No. 01-1704-JE

1.

Providence is an Oregon nonprofit corporation licensed in Oregon as a health care service contractor, authorized to provide health coverage to its members pursuant to contracts entered into with them, in some cases through group plans maintained by the members' employers.

2.

Defendants Gary McDowell and Roselea McDowell, his wife, are individuals residing at 35195 S.E. Cortez Place, Albany, Oregon 97321, in Linn County, Oregon.

3.

On February 27, 1990, Gary McDowell applied for health coverage with Providence's predecessor in interest by merger, SelectCare Health Plans, through his employer Teledyne Wah Chang; a true copy of his application is attached as Exhibit I to this complaint and incorporated by reference. On the same application, Roselea McDowell applied for coverage as Gary McDowell's spouse. Both Gary McDowell and Roselea McDowell renewed their coverage each subsequent year with Select Care Health Plans and with Providence, including calendar year 2000. As of January 1, 2000, Providence issued a health care service contract to Teledyne Wah Chang's successor Oremet Wah Chang, under which Gary McDowell and Roselea McDowell were provided health coverage, subject to all its terms ("the Group Contract"); a true copy of the Group Contract is attached as Exhibit 2 to this complaint and incorporated by reference.

4.

On or about February 13, 2000, Gary and Roselea McDowell were injured in an automobile accident on account of being struck by an automobile driven by one Nikolas Peterson. As a result of the injuries, Providence paid a total of $18,741.81 for Gary McDowell's medical care, and a total of $13,687.37 for Roselea McDowell's care.

5.

In connection with their injuries, Gary and Roselea McDowell brought claims in February 2001 in the Washington Superior Court for Pierce County, No. 01-2-09210-9, against Nikolas Peterson and his employer Statewide, Inc. for negligence, asserting damages in an amount over $820,000 ("the Third-Party Action"). In connection with the Third-Party Action, defendants have recovered an amount presently unknown to Providence but believed to be approximately $500,000.

6.

Under the terms of paragraph 11.2 of the Group Contract, defendants are obligated to repay Providence from any recovery such as that from the Third-Party Action, in an amount equal to the full value of the benefits provided, less a proportionate share of reasonable attorneys' fees. On or about May 25, 2000, defendants signed and their counsel Gordon T. Carey, Jr. accepted Providence's Agreement of Counsel for Reimbursement to Providence from Third Party Recovery, true copies of which are attached as Exhibits 3 and 4 to this complaint and incorporated by reference ("the Trust Agreements"). Under the Trust Agreements, defendants irrevocably directed their counsel to reimburse Providence "directly and promptly" from any settlement or recovery in the Third Party Action "a sum equal to the total amount of the benefits paid ... by Providence ... , less a proportionate share of the reasonable costs and attorney fees incurred in obtaining the recovery."

7.

Defendants have refused to comply with the Group Agreement and with the Trust Agreements, which require payment to Providence of $21,727.55, given industry custom that Providence's proportionate share of collection expenses equals one-third of the amount Providence paid on defendants' behalf. Under cover of a letter from Mr. Carey dated September 24, 2001, defendants tendered a portion of this amount "in full payment of any claim," indicating that Providence would have to file suit if it wanted otherwise to enforce its contractual rights.

8.

Providence is entitled to recover $21,727.55 from defendants, and has been damaged in that amount by defendants' refusal to comply with their obligations under the Group Agreement and under the Trust Agreements.

SECOND CLAIM FOR RELIEF

(Prejudgment Interest)

9.

Providence incorporates paragraphs 1 through 8 above.

10.

Defendants' obligations to repay Providence under the Group Agreement and under the Trust Agreements are liquidated and therefore subject to an award of prejudgment interest at the 9% statutory rate from the date defendants received their settlement.

THIRD CLAIM FOR RELIEF

(Attorneys' Fees)

11.

Providence incorporates paragraphs 1 through 10 above.

12.

Defendants are obligated under paragraph 11.8 of the Group Contract to reimburse Providence for the reasonable attorney fees incurred by Providence in enforcing the provisions of the Group Contract.

PRAYER FOR RELIEF

WHEREFORE Providence asks that the Court:

1. Award Providence judgment for damages for breach of the Group Agreement against defendants, jointly and severally, in the amount of $21,727.55, plus prejudgment interest, or such other amount as may be proven at trial;

2. Award Providence its taxable costs, expenses, and reasonable attorneys' fees; and

3. Award Providence such other relief as may be just and equitable in the circumstances.

DATED this 17th of October, 2001.

/s/ Arden J. Olson
Of Attorneys for Providence

APPENDIX H

On April 12, 2002, plaintiff Providence Health Plan, filed a COMPLAINT in the United States District Court for the District of Oregon, Case No. 02-6110 in McDowell II as follows:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Providence Health Plan, an Oregon corporation, *Plaintiff*, v. Gary and Roselea McDowell *Defendants*.

PARTIES

1. Providence is an Oregon nonprofit corporation licensed in Oregon as a health care service contractor, authorized to provide health coverage to its members pursuant to contracts entered into with them, in some cases through group plans maintained by the members' employers.

2. Defendants Gary McDowell and Roselea McDowell, his wife, are individuals residing at 35195 S.E. Cortez Place, Albany, Oregon 97321, in Linn County, Oregon.

JURISDICTION AND VENUE

3. The matter in controversy is governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq ("ERISA"). This Court has jurisdiction pursuant to 29 U.S.C. §I132(a)(3), which authorizes fiduciaries under ERISA to bring suit for appropriate equitable relief.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a).

THE HEALTH PLAN

5. On February 27, 1990, Gary McDowell applied for health coverage with Providence's predecessor in interest by merger, SelectCare Health Plans, through his employer Teledyne Wah Chang; a true copy of his application is attached as Exhibit 1 to this complaint and incorporated by reference. On the same application, Roselea McDowell applied for coverage as Gary McDowell's spouse. Both Gary McDowell and Roselea McDowell renewed their coverage each subsequent year with SelectCare Health Plans and with Providence, including calendar year 2000. As of January 1, 2000, Providence issued a health care service contract to Teledyne Wah Chang's successor Oremet Wah Chang, under which Gary McDowell and Roselea McDowell were provided health coverage, subject to all its terms ("the Plan"); a true copy of the Plan is attached as Exhibit 2 to this complaint and incorporated by reference. With respect to the Plan, Providence is a "fiduciary" as that term is used in ERISA.

THE THIRD PARTY RECOVERY

6. On or about February 13, 2000, Gary and Roselea McDowell were injured in an automobile accident on account of being struck by an automobile driven by one Nikolas Peterson. As a result of the injuries, Providence paid a total of $18,741.81 for Gary McDowell's medical care, and a total of $13,687.37 for Roselea McDowell's care.

7. In connection with their injuries, Gary and Roselea McDowell brought claims in February 2001 in the Washington Superior Court for Pierce County, No. 01-2-09210-9, against Nikolas Peterson and his employer Statewide, Inc. for negligence, asserting damages in an amount over $820,000 ("the Third-Party Action"). In connection with the Third-Party Action, defendants have recovered an amount presently unknown to Providence but believed to be approximately $500,000.

8. Under the terms of paragraph 11.2 of the Plan, defendants are obligated to repay Providence from any recovery such as that from the Third-Party Action, in an amount equal to the full value of the benefits provided, less a proportionate share of reasonable attorneys' fees. On or about May 25, 2000, defendants signed and their counsel Gordon T. Carey, Jr. accepted Providence's Agreement of Counsel for Reimbursement to Providence from Third Party Recovery, true copies of which are attached as Exhibits 3 and 4 to this complaint and incorporated by reference ("the Trust Agreements"). Under the Trust Agreements, defendants irrevocably directed their counsel to reimburse Providence "directly and promptly" from any settlement or recovery in the Third Party Action "a sum equal to the total amount of the benefits paid ... by Providence ... , less a proportionate share of the reasonable costs and attorney fees incurred in obtaining the recovery."

9. Defendants have refused to comply with the Plan and with the Trust Agreements, which require payment to

Providence of $21,727.55, given industry custom that Providence's proportionate share of collection expenses equals one-third of the amount Providence paid on defendants' behalf. Under cover of a letter from Mr. Carey dated September 24, 2001, defendants tendered a portion of this amount "in full payment of any claim," indicating that Providence would have to file suit if it wanted otherwise to enforce its contractual rights.

10. Providence is entitled under the terms of the Plan to recover $21,727.55 from defendants, and has been damaged in that amount by defendants' refusal to comply with their obligations under the Plan and under the Trust Agreements.

11. Providence brought suit under its contract in Linn County Circuit Court on October 18, 2001, in *Providence Health Plan v. McDowell*, No. 012087 (Linn County, Oregon). On November 26, 2001, defendants removed that case to the United States District Court for the District of Oregon, in *Providence Health Plan v. McDowell*, No. 01-CV-1704- JE (D. Or.). Defendants moved to dismiss for failure to state a claim upon which relief may be granted, alleging that ERISA preempted Providence's state law contract claim, and Providence moved to remand the case to the Linn County Circuit Court on the ground that ERISA provided no subject matter jurisdiction over that state law contract claim. The motions were submitted to Magistrate John Jelderks pursuant to consents, and on January 29, 2002, the court issued its decision, a copy of which is attached as

Exhibit 5 to this complaint and incorporated by reference ("the Preemption Ruling"). In summary, the Preemption Ruling found that:

(a) An action to enforce the provisions of an employee welfare benefit plan is a claim "related to" that plan for purposes of ERISA preemption;

(b) Providence's state law claim was therefore completely pre empted by ERISA;

(c) Providence's state law claim was not based on a state law "which regulates insurance" so as to be saved from preemption under 29 U.S.C. §1144(b)(2)(A);

(d) Removal to this court was therefore proper and remand should be denied; and

(e) Providence, therefore, "may be left without a remedy" for the defendants' breach of contract.

12. Judgment was entered under the Preemption Ruling on January 29, 2002, and thereafter timely appealed to the United States Court of Appeals for the Ninth Circuit, where the appeal is now pending.

FIRST CLAIM FOR RELIEF

(Injunction requiring Specific Performance of ERISA Plan)

13. Plaintiff realleges paragraphs 1 though 12 above.

14. Specific performance may be "appropriate equitable relief" under 29 U.S.C. §1132(a)(3)(B).

15. An injunction requiring specific performance of an otherwise valid contract is appropriate when plaintiff has substantially performed its part of the contract, defendant is able to perform, and plaintiff has no adequate remedy at law.

16. The Plan is a valid contract.

17. Providence has substantially performed its obligations under the Plan.

18. Defendants are able to perform their obligations under the Plan.

19. Under the terms of the Preemption Ruling, Providence has no adequate remedy at law under state law, because this court has ruled that any state law contract remedy otherwise available to Providence has been preempted by ERISA. Under *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708, 2002 WL 15399 (2002), Providence has no adequate remedy at law under federal law, because only "equitable remedies" are available to it under the terms of 29 U.S.C. § 1132(a)(3). Providence has, therefore, no adequate remedy at law under either federal or state law, and will be irreparably harmed absent an injunction from this court requiring defendants to perform their obligations under the Plan.

20. Providence is therefore entitled to an injunction under 29 U.S.C. § 1132(a)(3) requiring defendants to perform their reimbursement obligations under the Plan.

SECOND CLAIM FOR RELIEF

(Prejudgment Interest)

21. Plaintiff realleges paragraphs 1 though 20 above.

22. Defendants' obligations to repay Providence under the Plan and under the Trust Agreements are liquidated and therefore subject to an award of prejudgment interest at the rate determined under 28 U.S.C. §1961 from the date defendants received their settlement.

THIRD CLAIM FOR RELIEF

(Attorneys' Fees)

23. Plaintiff realleges paragraphs 1 though 22 above.

24. Providence is entitled to an award of its reasonable attorneys' fees and costs under 29 U.S.C. § 1132(g).

PRAYER FOR RELIEF

WHEREFORE, Providence requests that this Court:

1. Issue an injunction requiring defendants to pay Providence the amount of $21,727.55, plus statutory prejudgment interest, or such other amount as may be proven at trial;
2. Award Providence its taxable costs, expenses, and reasonable attorneys' fees; and
3. Award Providence such other relief as may be just and equitable in the circumstances.

DATED this 12th of April, 2002.

/s/ Arden J. Olson
Of Attorneys for Providence

(2)

No. 04-883

Supreme Court, U.S.
FILED
MAR 2 - 2005
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In The

Supreme Court of the United States

GARY McDOWELL and ROSELEA McDOWELL,

Petitioners,

v.

PROVIDENCE HEALTH PLAN,
an Oregon non-profit corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDINGS
CORPORATE DISCLOSURE STATEMENT

Petitioners are Gary and Roselea McDowell, defendants below and cross-respondents to Providence Health Plan's conditional cross-petition for writ of certiorari, filed January 31, 2005.

Respondent Providence Health Plan was the plaintiff below and is also the cross-petitioner in its conditional cross-petition for writ of certiorari. Respondent's sole member is Providence Plan Partners, a Washington non-profit corporation, whose sole member is Providence Health System-Oregon, an Oregon non-profit corporation ("PH-OR"). PH-OR has as its sole member the Sisters of Providence-Mother Joseph Providence, a Washington non-profit corporation, which has as its members the Provincial Superior and members of the Provincial Council of the Sisters of Providence-Mother Joseph Providence.

There are no publicly held companies that own more than ten percent of the stock of respondent, its members, or its members' members. Respondent is a non-profit corporation and has no stock.

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDINGS	i
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
BRIEF IN OPPOSITION	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
COUNTER-STATEMENT OF THE CASE	3
I. Summary of Facts	4
II. Basis for Federal Jurisdiction	7
REASONS FOR DENYING THE PETITION FOR WRIT OF *CERTIORARI*	7
I. The Ninth Circuit's Conclusion That Respondent's State Law Breach of Contract Action May Go Forward in State Court Is Correct	8
A. Respondent's State Law Breach of Contract Action Does Not "Relate to" an ERISA Plan	9
B. Respondent's State Law Breach of Contract Action Does Not Fall Within ERISA's Civil Enforcement Provisions	13
II. The Ninth Circuit's Decision Does Not Conflict with Any Decision of this Court	16
III. The Decision Below Does Not Conflict with Any Prior Decision of the Ninth Circuit or with a Decision of Any Other Circuit Court	18

TABLE OF CONTENTS – Continued

Page

IV. The Existence of Two Contrary State Intermediate Appellate Court Decisions Does Not Warrant this Court's Review 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aetna Health, Inc. v. Davila, ___ U.S.___, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004) 16, 17, 18

Avco Corp. v. Machinists, 390 U.S. 557 (1968) 15

Bauhaus USA v. Copeland, 292 F.3d 439 (5th Cir. 2002) 20

Cement Masons Health and Welfare Trust Fund v. Stone, 197 F.3d 1003 (9th Cir. 1999) 20

Clorox v. U.S. District Ct. for N.D. of Cal., 779 F.2d 517 (9th Cir. 1985) 18

Community Health Plan v. Mosser, 347 F.3d 619 (6th Cir. 2003) 19

Cooperative Benefit Adm. v. Ogden, 367 F.3d 323 (5th Cir. 2004) 19

Englehardt v. Paul Revere Life Insurance Co., 139 F.3d 1346 (11th Cir. 1998) 18

FMC Medical Plan v. Owens, 122 F.3d 1258 (9th Cir. 1997) 20

Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002) ..... *passim*

Honolulu Joint App. & Train. Committee v. Foster, 332 F.3d 1234 (9th Cir. 2003) 19

Jass v. Prudential Health Care Plan, 88 F.3d 1482 (7th Cir. 1996) 18

McCoy v. Mass. Institute of Technology, 950 F.2d 13 (1st Cir. 1991) 18

Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987) 9, 14, 16

TABLE OF AUTHORITIES

Page

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 514 U.S. 645 (1995) 9, 10, 11, 12

Pacificare v. Martin, 34 F.3d 834 (9th Cir. 1994) 20

Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987) 12, 16

Primax Recoveries v. Sevilla, 324 F.3d 544 (7th Cir. 2003) 19

Qualchoice, Inc. v. Rowland, 367 F.3d 638 (6th Cir. 2004) 19

Reynolds Metals v. Ellis, 202 F.3d 1246 (9th Cir. 2000) 20

Shea v. Esensten, 107 F.3d 625 (8th Cir. 1997) 18

Toumajian v. Frailey, 135 F.3d 648 (9th Cir. 1998) 16

Westaff v. Arce, 298 F.3d 1164 (9th Cir. 2002) 20

STATE CASES

Behavioral Sci. Institute v. Great-West Life, 84 Wash. App. 863, 930 P.2d 933 (1997) 21

Jefferson-Pilot Life Insurance Co. v. Krafka, 57 Cal. Rptr. 2d 723 (Ct. App. 1996) 20, 21

Liberty N.W. Insurance Corp. v. Kemp, 85 P.3d 871 (Or. Ct. App. 2004) 20, 21

FEDERAL STATUTES

28 U.S.C. § 1254 7

28 U.S.C. § 1291 6

TABLE OF AUTHORITIES

Page

29 U.S.C. § 1002(1) 9
29 U.S.C. § 1132 ..... 13, 17
29 U.S.C. § 1132(a) 6, 13, 19
29 U.S.C. § 1132(a)(3) 7, 13, 14, 20
29 U.S.C. § 1144 2
29 U.S.C. § 1144(a) ..... *passim*
29 U.S.C. § 1144(b)(2)(A) 13
Fed. R. Civ. P. 12(b)(6) 5

BRIEF IN OPPOSITION

The petition for writ of *certiorari* should be denied because the United States Circuit Court for the Ninth Circuit correctly determined that the federal court lacked subject matter jurisdiction over respondent's state law breach of contract claim, because the claim was not completely preempted by the Employment Retirement Income Security Act of 1974 ("ERISA"). The Ninth Circuit's decision does not conflict with any decision of this Court or of another United States court of appeals. In the circumstances of this case, the fact that the Ninth Circuit's decision conflicts with a decision of two intermediate state appellate courts does not warrant this Court's review.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals in *Providence Health Plan v. McDowell* addressed the consolidated appeals of two unpublished decisions of the United States District Court for the District of Oregon in cases numbered 01-1704-JE ("*McDowell* I") App. E-1 – E-7 and 02-6110-TC ("*McDowell* II") App. F-1 – F-7. In its original opinion, filed on March 24, 2004, a unanimous three-judge panel of the Ninth Circuit reversed the district court's decision in *McDowell* I and remanded the case to the district court for further proceedings. The Ninth Circuit panel also affirmed the district court's decision in *McDowell* II. *Providence Health Plan v. McDowell*, 361 F.3d 1243 (9th Cir. 2004). The Ninth Circuit panel filed an amended opinion on October 1, 2004, which reached the same result as did its initial opinion. *Providence Health Plan v. McDowell*, 385 F.3d 1168 (9th Cir. 2004). App. A-1 – A-13. On the same date, the court also entered an order

denying petitioners' petition for rehearing *en banc*. App. B-1. Circuit Judge Thomas, joined by five other active judges, filed a dissenting opinion arguing that rehearing *en banc* should have been allowed. App. C-1 – C-5.

JURISDICTION

The Ninth Circuit filed its amended opinion and an order denying the petition for rehearing or rehearing *en banc* on October 1, 2004. The petition for writ of *certiorari* was docketed on December 30, 2004. By letter dated January 27, 2005, this Court granted respondent until March 2, 2005, to file its brief in opposition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 1132(a)(3) states:

"(a) Persons empowered to bring a civil action A civil action may be brought –

"(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan[.]"

29 U.S.C. § 1144 states in relevant part:

"(a) Supersedure; effective date

> "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975."

COUNTER-STATEMENT OF THE CASE

These consolidated cases involve respondent's attempts to enforce its undisputable contractual right to reimbursement from a third-party settlement obtained by petitioners for health care costs incurred by respondent on petitioners' behalf. Petitioners have filed a petition for writ of *certiorari* asking this Court to review the Ninth Circuit's decision in *Providence Health Plan v. McDowell*, 385 F.3d 1168 (2004). App. A. The Ninth Circuit's opinion addresses two district court decisions that were consolidated for purposes of appeal. The questions presented by the petition for writ of *certiorari* address the issue raised in *McDowell* I: Does the federal court have removal jurisdiction over a health care contractor's state court breach of contract claim against a beneficiary to enforce a reimbursement provision of the health care services contract?[1]

[1] *McDowell* II addresses a closely related question: When no adequate remedy is available at law, is a health care services contractor entitled to enforce the terms of a contract with a beneficiary in equity under 29 U.S.C. § 1132(a)(3)? The question presented by the Ninth Circuit's decision affirming *McDowell* II is the subject of respondent's conditional cross-petition for writ of *certiorari*.

With regard to *McDowell* I, the Ninth Circuit held that the federal court lacked removal jurisdiction over respondent's state law claim, because ERISA does not completely preempt a health care contractor's state law breach of contract action to enforce against the beneficiary a reimbursement provision of its health care services contract. The circuit court's opinion is correct and does not warrant review by this Court.

I. Summary of Facts

In February, 1990, petitioner Gary McDowell applied through his employer for health coverage with respondent's predecessor in interest by merger. App. G-2; A-2. On the same application, petitioner Roselea McDowell applied for coverage as Gary McDowell's spouse. App. G-2. Petitioners renewed their coverage each subsequent year. App. G-2. Respondent issued a health care services contract ("contract") to petitioner's employer, effective January 1, 2000, under which petitioners were provided health insurance coverage subject to all the terms of the contract. App. G-2; A-2 – A-3.

In February, 2000, petitioners were injured in an automobile accident. App. A-3. Respondent paid a total of $32,429.18 for petitioners' medical care for the injuries they sustained in the accident. App. A-3. Paragraph 11.2 of the contract required petitioners to repay those sums, less a proportionate share of reasonable attorney fees, to respondent from any third-party recovery. App. G-3; A-3. Additionally, on May 25, 2000, petitioners signed and their counsel accepted a trust agreement, through which petitioners irrevocably directed their counsel to comply with the contract's reimbursement provision. App. A-3; G-3.

In February, 2001, petitioners brought suit in Washington state court against both the driver of the vehicle which struck them and the driver's employer. Petitioners settled the action for an amount which respondent believes to be approximately $500,000. App. G-3; A-3. Petitioners refused to honor their obligation under the contract and trust agreement to repay respondent from the proceeds of the third-party settlement. App. A-3 – A-4; G-4.

To enforce petitioners' contractual reimbursement obligation, respondent filed *McDowell* I in Linn County, Oregon, Circuit Court on October 18, 2001, alleging that petitioners had breached their agreement in both the contract and the trust agreement to reimburse respondent from any third-party recovery for benefits paid on petitioners' behalf. App. G-1 – G-6. Petitioners removed the case to the United States District Court for the District of Oregon, claiming that ERISA completely preempted respondent's state law breach of contract claim. Petitioners also filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), alleging that the relief sought by respondent was unavailable under ERISA, and that respondent's complaint therefore failed to state a claim for relief. App. H-4. Respondent opposed the motion to dismiss and filed a motion to remand the case to state court. App. E-2.

The district court denied the motion to remand and granted the motion to dismiss on the ground that respondent's state law breach of contract claim was preempted by ERISA. App. E-1 – E-7.

On April 12, 2002, respondent filed a second action, under ERISA, against petitioners in the United States District Court for the District of Oregon for specific performance of the reimbursement provision of the contract

and the trust agreement (*McDowell* II). App. H-1 – H-7. Respondent alleged that the district court's decision in *McDowell* I left respondent with no adequate remedy at law to enforce its contract with petitioners. As a result, under the federal common law of equity, respondent was entitled to specific performance of those contracts as "appropriate equitable relief" under 29 U.S.C. § 1132(a)(3). App. H-5 – H-6. Relying on this Court's decision in *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), the district court granted petitioners' motion to dismiss and denied respondent's motion for summary judgment as moot. App. F-1 – F-7. Respondent appealed both from the judgment in *McDowell* I and from the judgment in *McDowell* II. The Ninth Circuit subsequently granted respondent's motion to consolidate the two cases for purposes of appeal. App. A-2.

On appeal, a panel of the Ninth Circuit reversed the judgment in *McDowell* I. The panel concluded that ERISA does not preempt respondent's state law breach of contract claim and that respondent's claim fell outside the scope of ERISA's civil enforcement scheme. App. A-10. Consequently, the court concluded that the federal court lacked jurisdiction over the claim and that removal was improper. App. A-10. The panel reversed and remanded *McDowell* I with instructions to remand the case to state court. App. A-10.[2]

Petitioners filed a petition for rehearing and suggestion for rehearing *en banc*. The panel unanimously rejected the

[2] The same panel affirmed the judgment in *McDowell* II. App. A-10. The Ninth Circuit had jurisdiction over respondent's timely appeal from the judgment in that case under 28 U.S.C. § 1291.

petition. App. B-1. Six members of the Ninth Circuit dissented from the denial of the hearing *en banc*. App. C-1 – C-5.

II. Basis for Federal Jurisdiction

In *McDowell* I, respondent filed a breach of contract action in state court to enforce its contractual reimbursement rights. Petitioners removed the case to federal district court. As the Ninth Circuit concluded, the district court did not have subject matter jurisdiction over respondent's state law breach of contract claim. This Court has jurisdiction to decide that jurisdictional question. 28 U.S.C. § 1254.[3]

The Ninth Circuit had jurisdiction over respondent's timely appeal from the judgment in *McDowell* I under 28 U.S.C. § 1291.

REASONS FOR DENYING THE PETITION FOR WRIT OF *CERTIORARI*

In *Great-West Life & Annuity Insurance Co. v. Knudson*, this Court decided that 29 U.S.C. § 1132(a)(3) did not authorize a fiduciary to sue a beneficiary in equity to enforce a reimbursement provision of a health care

[3] In *McDowell* II, the district court had jurisdiction pursuant to 29 U.S.C. § 1132(a)(3) over respondent's claim for appropriate equitable relief under ERISA. The district court determined otherwise, however, and held that the federal court had no equitable jurisdiction under ERISA over respondent's claim for specific performance. This Court has jurisdiction to decide that jurisdictional question as well. 28 U.S.C. § 1254.

services contract, because the claim seeking to recover money damages, was not equitable. 534 U.S. at 221. The Court acknowledged, however, that other remedies outside ERISA might be available to the fiduciary, and expressly left open the issue "whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would [be] preempted by ERISA." *Id.* at 220.

In reversing the judgment in *McDowell* I, the Ninth Circuit correctly answered the question left open by this Court in *Great-West* by holding that ERISA does not completely preempt respondent's state law breach of contract action. In reaching that conclusion, the circuit court appropriately applied the law as defined by this Court and by prior Ninth Circuit decisions. Contrary to petitioners' assertions otherwise, the decision does not conflict with a decision of any other federal circuit court. And while the Ninth Circuit's decision is contrary to a decision of the Oregon intermediate appellate court and a decision of the California intermediate appellate court, that conflict is not sufficiently significant to warrant review by this Court. Supreme Court Rule 10(a), 10(c). This Court should deny the petition for writ of *certiorari*.

ARGUMENT

I. The Ninth Circuit's Conclusion That Respondent's State Law Breach of Contract Action May Go Forward in State Court Is Correct

The Ninth Circuit correctly identified the two-part test for determining whether a state law claim concerning a plan governed by ERISA is removable to federal court:

the claim must both "be preempted by ERISA and must fall within the scope of ERISA's enforcement provisions". *Providence Health Plan*, 385 F.3d at 1171, citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-66 (1987); App A-5. The court concluded that respondent's state law breach of contract action failed each prong of this test, and therefore was not removable to federal court.

A. Respondent's State Law Breach of Contract Action Does Not "Relate to" an ERISA Plan

ERISA's preemption provision, 29 U.S.C. § 1144(a), provides that ERISA "shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."[4] To determine when a claim "relates to" an ERISA plan under this statute, the Ninth Circuit looked to this Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655-56 (1995). *Id.* at 1171-72; App. A-6. There, the Second Circuit Court of Appeals had held that a state law requiring hospital surcharges from certain health plans but not others was preempted by ERISA, reasoning (as do petitioners here)

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[4] An "employee welfare benefit plan" under ERISA is a "plan . . . maintained by an employer . . . *to the extent* that such plan . . . was established or is maintained for the purpose of providing for its participants . . . medical, surgical, or hospital care. . . ." 29 U.S.C. § 1002(1) (emphasis added). This statutory language makes clear that a document containing promises from an employer offering benefits to employees is, *to that extent*, an ERISA plan. To the extent the document also contains other promises, such as a promise to reimburse the insurer for benefits paid from a third-party recovery, those promises are not part of the ERISA-regulated plan.

that "ERISA's pre-emption clause must be read broadly to reach any state law having a connection with, or reference to, covered employee benefit plans." *Blue Cross & Blue Shield*, 514 U.S. at 653.

This Court reversed and in so doing flatly rejected the broad view adopted by the court below:

> If "relate to" were taken to extend to the furthest stretch of its indeterminacy, then for all practicable purposes pre-emption would never run its course, for "[r]eally, universally, relations stop nowhere." . . . But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality.

Id. at 655. Instead, the Court focused on whether a state law acts to "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself." *Id.* at 659. If "state laws leave plan administrators right where they would be in any case, with the responsibility to choose the best overall coverage for the money," this Court determined that "such state laws do not bear the requisite 'connection with' ERISA plans to trigger pre-emption." *Id.* at 662. The Court limited the reach of ERISA's preemption provision to state laws that impose "conflicting directives" on ERISA plans – that is, state laws that either mandate employee benefit structures or their administration, or subject plans or plan administrators to alternative enforcement mechanisms. *Id.* at 658, 662. The Court then held that a state law provision for surcharges had only an indirect economic effect on the relative costs of various health insurance packages in a given state, and was "a far cry from those 'conflicting

directives' from which Congress meant to insulate ERISA plans." *Id.* at 662.

The Ninth Circuit concluded that respondent's state law breach of contract claim was not preempted because it lacked the requisite connection to an ERISA plan:

> Here, the district court determined that the breach of contract action related to an ERISA plan because it sought the enforcement of a plan provision, the reimbursement provision. The district court erred in this respect because Providence's action for breach of contract does not have the requisite "connection with" or "reference to" an ERISA plan. Providence is simply attempting, through contract law, to enforce the reimbursement provision. Adjudication of its claim does not require interpreting the plan or dictate any sort of distribution of benefits. Providence has already paid ERISA benefits on behalf of the McDowells, and they are not disputing the correctness of the benefits paid. Rather, Providence claims that the McDowells have breached two promises: (a) the reimbursement provision incorporated into their ERISA plan, as it applies to monies paid to them by a non-ERISA third party, and (b) their agreement to direct their lawyer to reimburse Providence in the event of a settlement. Because this is merely a claim for reimbursement based upon the third-party settlement, it does not "relate to" the plan.

Id. at 1172; App. A-7.

Petitioners disagree with the Ninth Circuit's conclusion, and instead would interpret 29 U.S.C. § 1144(a) to preempt any claim by a fiduciary against a beneficiary, no

matter the circumstances. According to petitioners, any claim that "affects the relationship between the plan and the plan members [is] completely preempted." Petition at 18. Petitioners distinguish *Blue Cross & Blue Shield* on its facts, noting that the claim in that case was not a claim by a fiduciary against a beneficiary. Petition at 15-17. Petitioners' arguments ignore this Court's holding in *Blue Cross & Blue Shield*, which establishes that it is the nature of the claim and its impact on the administration of an ERISA plan, and not merely the relationship of the parties to the claim, that determine whether the claim "relates to" an ERISA plan for purposes of preemption.[5] 514 U.S. at 668.

As the Ninth Circuit noted, the existence of respondent's state law claim "does not require interpreting the plan or dictate any sort of distribution of benefits." *Providence Health Plan*, 385 F.3d at 1172; App. A-7. Nor does respondent's state law claim mandate employment benefit structures or their administration, or subject plans or plan administrators to alternative enforcement mechanisms. *See, e.g., Blue Cross & Blue Shield*, 514 U.S. at 658.[6] The

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[5] Petitioners would rely instead on this Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), a case that predates the *Blue Cross & Blue Shield* decision. In *Pilot Life*, the Court held that a claim by a beneficiary against a fiduciary for improper processing of a claim for benefits was "related to" an ERISA plan and therefore preempted. 481 U.S. at 52, 56. This conclusion is consistent with the Court's holding in *Blue Cross & Blue Shield*, because the claim in *Pilot Life* directly implicated the provision of benefits under an ERISA plan, while the claim in *Blue Cross & Blue Shield* did not.

[6] Petitioners claim that respondent's state law breach of contract action is an "alternative enforcement mechanism" and is thus preempted. Petition at 16 n.7. This Court's decision in *Blue Cross & Blue Shield* makes it clear that ERISA preempts alternative methods by which *beneficiaries* can enforce their rights under an ERISA plan. 514

(Continued on following page)

Ninth Circuit correctly determined that respondent's breach of contract claim lacked sufficient connection to an ERISA plan to bring it within ERISA's preemption provisions.[7]

B. Respondent's State Law Breach of Contract Action Does Not Fall Within ERISA's Civil Enforcement Provisions

The Ninth Circuit also determined that respondent's breach of contract action fails the second requirement of removal jurisdiction because it does not fall within the scope of ERISA's civil enforcement provision, 29 U.S.C. § 1132(a):

> As a fiduciary to the plan, Providence's only vehicle for relief in addressing violations or seeking enforcement of a plan is § 1132(a)(3). However, that section allows a fiduciary to seek only equitable relief for violation of the plan. Here, Providence is seeking ordinary damages – monetary relief – based upon contractual remedies that arise under state law. Therefore, its claim is not within ERISA's civil enforcement provisions.

U.S. at 658. A *fiduciary's* claim for breach of contract to enforce a reimbursement provision is not an "alternative enforcement mechanism" since, under this Court's decision in *Great-West*, ERISA does not provide an enforcement mechanism.

[7] In both the trial court and on appeal, respondent argued that its state law claim was not completely preempted for a separate reason: because it is saved from preemption by 29 U.S.C. § 1144(b)(2)(A), which provides that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance. . . ." The Ninth Circuit did not reach this issue, and petitioner does not raise it in his petition. Respondent reserves the right to address this issue should the Court consider the merits of this case.

Providence Health Plans, 385 F.3d at 1172-73 (citations omitted), App. A-8. In reaching its conclusion, the Ninth Circuit relied on this Court's decision in *Great-West*, in which the Court concluded that § 1132(a)(3) did not authorize a fiduciary to enforce a reimbursement provision in federal court, but left open the question answered by the Ninth Circuit below. *Id.* at 1173; App. A-8.

Petitioners disagree with the Ninth Circuit's formulation of the test for removal, arguing that "[t]he panel apparently believes that removal is dependent not only on Providence's claim 'relating to' the plan, but also on the claims's 'falling within the scope of § 1132.'" Petition at 19. According to petitioners, "any claim to enforce the plan falls within the scope of § 1132, which is the exclusive means of enforcing a plan. If § 1132 does not authorize Providence's claim in this case (and it does not), then no claim exists." Petition at 20.

Contrary to petitioners' assertions, this Court's decision in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), establishes that, to be removable to federal court, a state law claim must not only be preempted under 29 U.S.C. § 1144(a), but must also fall within ERISA's civil enforcement scheme, 29 U.S.C. § 1132. In the *Taylor* case, a former employee brought suit against his former employer and its insurer alleging breach of contract, retaliatory discharge and wrongful termination of disability benefits. 481 U.S. at 61. The defendants removed the case to federal court and the trial court denied the plaintiff's motion to remand and entered judgment for the defendants. *Id.* at 61-62. The federal circuit court reversed. *Id.* at 62. On *certiorari*, this Court began by noting that the plaintiff's state common law causes of action asserting improper processing of a claim for benefits under an

ERISA plan were preempted by ERISA. *Id.* at 62. That conclusion, however, did not end the inquiry. The Court went on to note that:

> There is no dispute in this litigation that [the plaintiff's] complaint, although pre-empted by ERISA, purported to raise only state law causes of action. The question therefore resolves itself into whether or not the *Avco* principle can be extended to statutes other than the LMRA in order to recharacterize a state law complaint displaced by [§ 1144(a)] as an action arising under federal law. In *Franchise Tax Board*, the Court held that ERISA preemption, without more, does not convert a state claim into an action arising under federal law. The court suggested, however, that a state action that was not only preempted by ERISA, but also came "within the scope of § 502(a) [§1144(a)] of ERISA" might fall within the *Avco* rule.

Id. at 64 (internal citations omitted).

In *Avco Corp. v. Machinists*, 390 U.S. 557 (1968), the Court held that in the context of the Labor Management Relations Act, Congress so completely preempted the area of labor-management contracts that any state cause of action for violation of a contract between an employer and a labor organization was necessarily federal in character and preempted, notwithstanding the fact that state law would provide a cause of action in the absence of the federal preemption statute. 390 U.S. at 560-61. This principle is an exception to the general rule that a federal defense does not authorize removal of a state law claim to federal court.

In *Taylor*, the Court held that the *Avco* principle applied with equal force to ERISA preemption and concluded that a state law claim that was both preempted by 29 U.S.C. § 1144(a) and also fell within the scope of ERISA's civil enforcement scheme, 29 U.S.C. § 1132, was federal in character and removable to federal court. 481 U.S. at 64-66. *See also, Aetna Health, Inc. v. Davila*, ___ U.S. ___, 124 S.Ct. 2488, 2495-96, 159 L.Ed.2d 312 (2004) (state law causes of action within the scope of the civil enforcement provisions of § 502(a) are preempted and removable to federal court); *Toumajian v. Frailey*, 135 F.3d 648, 654 (9th Cir. 1998) (citing *Taylor*) ("Only if [a state court] complaint asserts a state law claim that can be reasonably characterized as a claim under any of ERISA's civil enforcement provisions can the action be properly removed").

The Ninth Circuit properly applied this analysis when it concluded that respondent's state law breach of contract claim was not removable to federal court because it fell outside the scope of ERISA's civil enforcement scheme and therefore could not reasonably be characterized as a federal claim.

II. The Ninth Circuit's Decision Does Not Conflict with Any Decision of this Court

Petitioners claim that the Ninth Circuit's decision conflicts with several of this Court's prior decisions. Petition at 9-12. Respondent has explained above that the Ninth Circuit's decision is consistent with *Pilot Life Ins. Co. v. Dedeaux* (*see* footnote 5, *supra*) and *Metropolitan Life Ins. Co. v. Taylor* (*see* Section I.B., *supra*). Petitioner also claims that the Ninth Circuit's decision is inconsistent

with *Great-West Life & Annuity Ins. Co. v. Knudson.* Petitioners argue that *Great-West* stands for the proposition that a state law breach of contract claim for reimbursement is completely foreclosed by ERISA. Petition at 10. Petitioners ignore the fact that the Court in *Great-West* expressly left open the question of "whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would [be] preempted by ERISA." *Great-West*, 534 U.S. at 220. The Ninth Circuit's decision here does not conflict with *Great-West*. It merely answers correctly the question that *Great-West* posed but did not answer.

Petitioners also claim that the Ninth Circuit's decision conflicts with this Court's opinion in *Aetna Health, Inc. v. Davila.* Petition at 11-12. Petitioners are wrong. In that consolidated appeal, a participant in and a beneficiary under two separate ERISA plans sued their respective plan administrators under the Texas Health Care Liability Act in state court, alleging that they suffered injuries due to the administrators' decisions not to provide coverage for treatment recommended by their physicians. 124 S.Ct. at 2493. In considering whether the defendants' state law claims were completely preempted by ERISA and removable to federal court, the Court considered whether the claims fell within the civil enforcement provisions in § 1132. 124 S.Ct. at 2494-97. The Court concluded that the defendants' claims were intended only to rectify a wrongful denial of benefits promised under an ERISA plan, and therefore were both related to an ERISA plan under § 1144(a), and also covered by ERISA's civil enforcement scheme, § 1132. As a result, the Court concluded that the claims were completely preempted by ERISA, and removable to federal court. *Id.* at 2497-98.

The Ninth Circuit properly applied the legal principles of the *Aetna Health* case, but came to the opposite conclusion. The circuit court correctly concluded that respondent's state law breach of contract claim for reimbursement was not removable to federal court, because, unlike the claims in the *Aetna Health* case, it fell outside the scope of ERISA's civil enforcement scheme.

III. The Decision Below Does Not Conflict with Any Prior Decision of the Ninth Circuit or with a Decision of Any Other Circuit Court

Petitioners provide a list of decisions by the Ninth Circuit and by other federal circuit courts that they claim are in conflict with the Ninth Circuit's decision in this case. Petition at 9, 12. None of the cases cited conflict with the decision below. The cases petitioners cite fall into two categories. The first category of cases involves state law claims by a participant or beneficiary to enforce a right to benefits under an ERISA plan. In each case the court found such claims to be preempted by ERISA. *See Englehardt v. Paul Revere Life Ins. Co.*, 139 F.3d 1346 (11th Cir. 1998) (participant's state law fraudulent inducement claim preempted by ERISA); *Shea v. Esensten*, 107 F.3d 625 (8th Cir. 1997) (surviving spouse's state law wrongful death claim for fraudulent nondisclosure and misrepresentation by an HMO preempted by ERISA); *Jass v. Prudential Health Care Plan*, 88 F.3d 1482 (7th Cir. 1996) (participant's state law negligence and vicarious liability claims against plan, physician and nurse for denial of necessary medical treatment preempted by ERISA); *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13 (1st Cir. 1991) (state mechanics' lien statute preempted to the extent it concerned the rights of employee benefit plans); *Clorox v. U.S. Dist. Ct.*

for N.D. of Cal., 779 F.2d 517 (9th Cir. 1985) (employee's state law claims relating to improper handling of employee benefits claims and negligent management of employee benefit plan preempted by ERISA).

In this case, the Ninth Circuit concluded that respondent's state law breach of contract claim was not preempted. The court reasoned that, unlike the claims at issue in the cases cited above, adjudication of respondent's state law breach of contract claim "does not require interpreting the plan or dictate any sort of distribution of benefits. Providence has already paid ERISA benefits on behalf of the McDowells, and they are not disputing the correctness of the benefits paid." *Providence Health Plan*, 385 F.3d at 1172, App. A-7. The Ninth Circuit's decision is consistent with each of the cases cited above, but, on the facts of this case, reaches the opposite conclusion.

The second category of cases cited by petitioners involves federal claims for reimbursement of benefits paid. In each case, the court found that such claims are not properly brought in federal court under ERISA. *See Qualchoice, Inc. v. Rowland*, 367 F.3d 638 (6th Cir. 2004), *pet. for cert. filed*, ___ U.S. ___ (federal claim for reimbursement of benefits paid by health care plan not allowed under 29 U.S.C. § 1132(a)(3)); *Cooperative Benefit Adm. v. Ogden*, 367 F.3d 323 (5th Cir. 2004) (same); *Community Health Plan v. Mosser*, 347 F.3d 619 (6th Cir. 2003) (same); *Honolulu Joint App. & Train. Comm. v. Foster*, 332 F.3d 1234 (9th Cir. 2003) (federal restitution claim brought by committee that administered training program against a former employee for breach of scholarship loan agreement not allowed under 29 U.S.C. § 1132(a)(3)); *Primax Recoveries v. Sevilla*, 324 F.3d 544 (7th Cir. 2003) (federal claim for reimbursement of benefits paid by health care plan not permitted under 29 U.S.C.

§ 1132(a)(3)); *Westaff v. Arce*, 298 F.3d 1164 (9th Cir. 2002) (same); *Bauhaus USA v. Copeland*, 292 F.3d 439 (5th Cir. 2002) (same); *Reynolds Metals v. Ellis*, 202 F.3d 1246 (9th Cir. 2000) (same); *Cement Masons Health and Welfare Trust Fund v. Stone*, 197 F.3d 1003 (9th Cir. 1999) (same); *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997) (same); *Pacificare v. Martin*, 34 F.3d 834 (9th Cir. 1994) (same).

Again, the Ninth Circuit's decision does not conflict with any of these cases. The majority opinion in *Great-West* stands for the same proposition as does each of the cases cited above: a fiduciary's claim to enforce a reimbursement provision is not within the scope of 29 U.S.C. § 1132(a)(3), and thus does not properly lie in federal court. The Ninth Circuit's decision in this case addresses a different question – whether a fiduciary's claim to enforce a reimbursement provision can proceed in state court – and concludes that the state law claim is not completely preempted by ERISA and may go forward in state court. For all of the reasons described above, the Ninth Circuit's conclusion is correct.

IV. The Existence of Two Contrary State Intermediate Appellate Court Decisions Does Not Warrant this Court's Review

Petitioners point to the existence of two opinions issued by intermediate appellate courts–one from California and the other from Oregon–as a reason why this Court should grant review in this case. *Liberty N.W. Ins. Corp. v. Kemp,* 85 P.3d 871 (Or. Ct. App. 2004) (insurer's action for reimbursement is preempted by ERISA); *Jefferson-Pilot Life Ins. Co. v. Krafka,* 57 Cal. Rptr. 2d 723 (Ct. App. 1996) (same). Petition at 25. In response to petitioners' petition for rehearing, the Ninth Circuit amended its original opinion to address these state cases. The court concluded:

> We are cognizant that our decision is in conflict with the decisions of some states [citing *Liberty N.W.* and *Jefferson-Pilot Life* cases]. However, in light of our precedent and the Supreme Court's recent direction in *Great-West*, we cannot agree with these courts' construction of "relate to," and instead we agree with those states that have found no ERISA preemption. *See, e.g., Behavioral Sci. Inst. v. Great-West Life*, 84 Wash. App. 863, 930 P.2d 933 (1997) (finding no preemption of action by self-insured employer against "stop loss" reinsurer for breach of contract and bad faith where reinsurer denied stop-loss coverage of employee's medical treatment).

Providence Health Plan, 385 F.3d at 1173; App. A-9 – A-10.

Particularly given the existence of this Ninth Circuit decision, the existence of a single intermediate appellate court decision in each of only two states is not a sufficiently compelling reason to require the Court's review.

CONCLUSION

For the reasons discussed above, the Court should deny the petition for writ of *certiorari* in this case.

Respectfully submitted,

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(3)

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No. 04-883

In The Supreme Court of the United States

GARY McDOWELL and
ROSELEA McDOWELL,

Petitioners,

v.

PROVIDENCE HEALTH CARE PLAN,
an Oregon non-profit corporation,

Respondent.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN REPLY

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TABLE OF CONTENTS

	Page
BRIEF IN REPLY	1
REPLY TO PROVIDENCE'S COUNTER-STATEMENT OF THE CASE (AND SUMMARY OF FACTS)	1
REPLY TO PROVIDENCE'S ASSERTED REASONS FOR DENYING THE McDOWELLS' PETITION	4
REPLY TO PROVIDENCE'S ARGUMENT	5
Reply to Argument I.A.: Respondent Providence's State Law Breach of Contract Action Relates to its ERISA Plan	5
Reply to Argument II: The Panel's Decision Conflicts with Decisions of the Federal Circuits	9
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES

Bauhaus USA v. Copeland, 292 F3d 439 (5th Cir. 2002) 10

Community Health Plan v. Mosser, 347 F3d 619 (6th Cir. 2003) 9

Cooperative Benefit Adm. v. Ogden, 367 F3d 323 (5th Cir. 2004) 9

Doi v. Halekulani Corp., 276 F3d 1131 (9th Cir. 2002) 8

Great-West Life and Annuity Co. v. Knudson, 534 US 204, 122 S Ct 708, 151 L Ed 2d 635 (2002) 4

Heller v. Doe, 509 US 312, 125 L Ed 2d 257, 113 S Ct 2637 (1993) 9

Honolulu Joint App. & Train. Committee v. Foster, 332 F3d 1234 (9th Cir. 2003) 9

New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 US 645, 115 S Ct 1671, 131 L Ed 2d 695 (1995) 5

Pacificare v. Martin, 34 F3d 834 (9th Cir. 1994) 10

Pegram v. Herdrich, 530 US 211, 147 L Ed 2d 164, 120 S Ct 2143 (2000) 5, 6

Pilot Life Ins. Co. v. Dedeaux, 418 US 41, 107 S Ct 1549, 95 L Ed 2d 39 (1987) 3

Primax Recoveries v. Sevilla, 324 F3d 544 (7th Cir. 2003) 10

TABLE OF AUTHORITIES – Continued

Page

Providence Health Plan v. McDowell, 385 F3d 1168 (9th Cir. 2004) 6

Qualchoice, Inc. v. Rowland, 367 F3d 638 (6th Cir. 2004) 9

Sanson v. General Motors Corp., 966 F2d 618 (11th Cir. 1992) 3, 10

Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F3d 1101 (9th Cir. 2001) 8

STATUTES

FEDERAL

29 USC § 1002 5

29 USC § 1132 9

29 USC § 1144 8

STATE

ORS 742.538 8

OTHER AUTHORITY

Webster's Unabridged Dictionary, 2d Ed (1983) 6

BRIEF IN REPLY

Petitioners McDowell submit this brief in reply to address new matter in the brief in opposition submitted by respondent Providence Health Plan in Supreme Court Case No. 04-883. This Court should grant petitioner McDowells' petition for writ of *certiorari*, and deny cross-petitioner Providence Health Plan's conditional cross-petition.

REPLY TO PROVIDENCE'S COUNTER-STATEMENT OF THE CASE (AND SUMMARY OF FACTS)

Respondent Providence asserts at page three that these consolidated cases "involve respondent's attempts to enforce its undisputable contractual right to reimbursement" under its health care services contract. Respondent Providence avoids characterizing its contract as an ERISA plan, but that is exactly what the health care services contract is. The health care services contract upon which respondent Providence relies (the actual document is named a "Master Group Contract") defines itself as a "plan." Master Group Contract, Exhibit 2 to Complaint in **McDowell I**, USDC Case No. 01-1704, CR:1, p. 7, paragraph 1.41, p. 54, paragraph 15.22.[1] Respondent alleged in its complaint in **McDowell II**, USDC Case No. 02-6110,

[1] Pages 7 and 54 of the document (Master Group Contract) are pages 12 and 59 of the Exhibit 2, respectively. The McDowells will cite plan provisions by citing the document pages, not the exhibit pages. The document pages are in the lower right-hand corner.

p. 2, paragraph 5, App:H-2, that the health care services contract was an ERISA plan.[2]

In any event, petitioners McDowell never signed the health care services contract, never signed an application requesting coverage from respondent Providence, never signed an enrollment form with respondent Providence, never signed the Master Group Contract, and never agreed to the terms of respondent Providence's plan, and particularly the reimbursement provision relied upon by respondent.[3] Mr. McDowell obtained health care coverage through his employer. After SelectCare provided coverage through 1999, respondent unilaterally issued in 2000 its own form of plan with the reimbursement provision and provided coverage for Mr. McDowell and his co-workers for one year, after which Mr. McDowell's employer terminated respondent Providence. Affidavit of Gary McDowell, p. 2, in **McDowell II**, USDC Case No. 02-6110, CR:16.

Respondent Providence asserts at page four that the McDowells signed, and the undersigned counsel accepted, a "trust agreement," agreeing to reimburse respondent for medical expenses paid. The fact is that respondent Providence was obligated under its plan to pay the McDowells' medical expenses. See, Master Group Contract, Exhibit 2 to Complaint in **McDowell I**, USDC Case No. 01-1704, CR:1, pp. 23-39. But, contrary to respondent Providence's

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[2] Indeed respondent's name, **Providence Health Care Plan**, suggests that its contractual commitments are covered by ERISA.

[3] In respondent's brief in opposition, page four, respondent contends that the McDowells applied for health coverage with respondent's "predecessor-in-interest by merger," SelectCare Health Plans. There is no evidence in the trial court record (other than counsel for respondent's assertion) that SelectCare Health Plans was respondent's predecessor-in-interest by merger.

obligation under the plan to pay the McDowells' medical expenses, it refused to pay for the McDowells' medical expenses unless and until the McDowells signed the "trust agreement." When the McDowells' medical providers demanded payment, the McDowells signed the trust agreement so that their medical bills would be paid. However, the McDowells signed the document under protest. Affidavit of Mr. McDowell, p. 2., in **McDowell II**, USDC Case No. 02-6110, CR:16. Respondent Providence provided no consideration in return for execution of the trust agreement. Magistrate Judge Jelderks in **McDowell I** held that the trust agreement lacked consideration. **McDowell I** Opinion, App:E-3-4, footnote 1. Respondent Providence did not assign error in the ninth circuit to the district court's finding.

In respondent's brief in opposition, page six, respondent asserts that "under the federal common law of equity, respondent was entitled to specific performance of those contracts as other 'appropriate equitable relief' under 29 USC § 1132(a)(3)." Respondent Providence is mistaken. Federal courts should not create a common law remedy when ERISA does not authorize one. See, e.g., *Sanson v. General Motors Corp.*, 966 F2d 618, 621-622 (11th Cir. 1992), *reh den*, 974 F2d 1350, *cert den*, 507 US 984 (action by retiree against former employer in which retiree contended he was defrauded of pension benefits). Relying on *Pilot Life Ins. Co. v. Dedeaux*, 418 US 41, 107 S Ct 1549, 95 L Ed 2d 39 (1987), the *Sanson* court noted that this Court had previously considered and rejected such an extension of remedies. 966 F2d at 622.

REPLY TO PROVIDENCE'S ASSERTED REASONS FOR DENYING THE McDOWELLS' PETITION

On page eight, respondent Providence asserts that this Court "acknowledged that other remedies outside ERISA might be available to the fiduciary, and expressly left open the issue of whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would [be] preempted by ERISA," citing page 220 of this Court's opinion in *Great-West Life & Annuity Ins. Co. v. Knudson,* 534 US 204, 122 S Ct 708, 151 L Ed 2d 635 (2002). What this Court actually said in *Great-West* was:

> "We note, though it is not necessary to our decision, that there may have been other means for petitioners to obtain the essentially legal relief that they seek. We express no opinion as to whether the petitioners could have intervened in the state-court tort action brought by respondents or whether a direct action by petitioners against respondents asserting state-law claims such as breach of contract would have been preempted by ERISA." 534 US at 220.

As petitioners McDowell have pointed out repeatedly, Providence had adequate state law remedies, but chose not to pursue them. Respondent Providence could have pursued a subrogation action against the third-party tortfeasors (§ 11.4 of the plan contemplates such a subrogation action; see, Exhibit 2 to Complaint in **McDowell I**, USDC Case No. 01-1704, CR:1, p. 43), or sought reimbursement directly from the tortfeasors' liability insurance carrier, or intervened in the McDowells' Washington state action against the tortfeasors, but chose not to pursue any of those options. None of those alternatives would have

involved an action between an ERISA fiduciary and an ERISA beneficiary or participant. *Great-West* did not preclude such actions.

REPLY TO PROVIDENCE'S ARGUMENT

Reply to Argument I.A.: Respondent Providence's State Law Breach of Contract Action Relates to its ERISA Plan

Respondent Providence contends that its state law claim for breach of contract does not relate to its ERISA plan, citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 US 645,115 S Ct 1671, 131 L Ed 2d 695 (1995). Petitioners have already discussed *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* See, Petition for Writ of *Certiorari* in 04-883, pp. 15-16. In addition, however, respondent, in footnote 4 on page 9, cites the definition of "employee welfare benefit plan" in 29 USC § 1002(1). Respondent contends that the definition in § 1002(1):

> " . . . makes clear that a document containing promises from an employer offering benefits to employees is, to that extent, an ERISA Plan. To the extent the document also contains other promises, such as a promise to reimburse the insurer for benefits paid from a third-party recovery, those promises are not part of the ERISA-regulated plan." Respondent's Brief in Opposition, p. 9, footnote 4.

Respondent offers no authority for such an interpretation of 29 USC § 1002(1), and counsel for petitioners has found none. Indeed, this Court's discussion in *Pegram v. Herdrich,* 530 US 211, 147 L Ed 2d 164, 120 S Ct 2143 (2000) would indicate otherwise. An ERISA plan does not merely include promises by the fiduciary to pay benefits, but also

for example includes promises by the participant (or his employer) to pay premiums, includes the rules governing collection of premiums, includes the definition of benefits payable, includes the requirements for submission by the participant or beneficiary of claims, and includes the procedures for resolution of disagreements over benefits payable. 530 US at 222-223. In other words, an ERISA plan seeks to impose obligations on both fiduciaries and participants (or beneficiaries).

At pages 11 and 12 of its brief in opposition, respondent Providence quotes the panel's stated reason for holding that Providence's state law claim did not relate to the plan:

> "Adjudication of its claim does not require interpreting the plan or dictate any sort of distribution of benefits." *Providence Health Plan v. McDowell,* 385 F3d 1168, 1172 (9th Cir. 2004).

Respondent again cites the same language in its brief in opposition at page 19. With all due respect to the panel, petitioners strongly disagree. The reimbursement provision is contained in § 11 of the plan. See, Exhibit 2 to Complaint in **McDowell I,** USDC Case No. 01-1784, CR:1, pp. 42-43. In the quoted language, the panel first asserts that adjudication of Providence's claim will not require "interpretation" of the plan. "Interpret" means to explain or construe. See, *Webster's Unabridged Dictionary,* 2d Ed (1983). Certainly, if respondent's complaint is remanded to state court, the state court judge will have to "interpret" and apply the reimbursement provision (§ 11.2) of the plan. For example, what are the "proceeds of any settlement" to which Providence contends the reimbursement provision applies? For another example, what is a "proportionate share of reasonable attorney's fees" which should be deducted from any reimbursement? These phrases are

part of the language of the reimbursement provision (§ 11.2).

In the same quoted language, the panel next asserts that adjudication of the McDowells' claim does not dictate a distribution of benefits. But, Mr. McDowell's employer paid premiums to respondent Providence in return for which Providence promised to pay the McDowells' medical expenses. As a result of application of the reimbursement provision of the plan, Providence will recover the benefits paid (less their share of attorney's fees). Thus, by application of § 11.2, Providence avoids paying benefits.

Pursuant to another subsection of § 11, specifically § 11.5, respondent Providence contended it had the right to require the McDowells to execute the "trust agreement" requiring the McDowells to reimburse respondent Providence from the McDowells' recovery from the tortfeasors. See, Exhibit 2 to Complaint in **McDowell I**, USDC Case No. 01-1784, CR:1, pp. 47-48. Does counsel for Providence contend that § 11.5 is also not part of the plan?

In footnote 6, pages 12-13 of respondent Providence's brief in opposition, respondent reveals its essential position in this case. Respondent states:

> Petitioners claim that respondent's state law breach of contract action is an "alternative enforcement mechanism" and is thus preempted. [Citation omitted] This Court's decision in *Blue Cross & Blue Shield* makes it clear that ERISA preempts alternative methods by which *beneficiaries* can enforce their rights under an ERISA plan. 514 US at 658. A *fiduciary's* claim for breach of contract to enforce a reimbursement provision is not an "alternative enforcement mechanism" since, under this Court's decision in *Great-West*, ERISA does not provide an

> enforcement mechanism. (Respondent's emphasis) Respondent's Brief in Opposition, pp. 12-13, footnote 6.

Respondent Providence thus contends that the prohibition against "alternative enforcement mechanisms" is a one-way street. Respondent apparently believes that the prohibition prevents a beneficiary or participant from suing a fiduciary for state law claims, such as a claim for bad faith, but does not prevent a fiduciary from suing a beneficiary or participant for state law claims. No decision of this Court so holds, and there is no indication that this court intended the prohibition to be so one-sided.

At footnote 7, page 13 of respondent's brief in opposition, respondent Providence asserts that in the trial court, and on appeal, respondent argued that its state law claim was saved from preemption by 29 USC § 1144(b)(2)(A) because respondent's state law claim was a "state law" regulating insurance. Respondent misleads this Court. Respondent Providence argued **for the first time** in the ninth circuit, citing and relying on ORS 742.538, that its state law claim was a "state law" regulating insurance. Respondent Providence did not cite ORS 742.538 or otherwise argue that statute in the trial court. Rather, respondent Providence stated in the trial court only that it was a "health care service contractor . . . under Oregon law, regulated by the Department of Consumer and Business Services under ORS chapter 750" and that Oregon statutes regulated "health plan forms." Memorandum in Support of Motion to Remand, p. 13, in **McDowell I**, 01-1704, CR:7. Thus, since respondent Providence did not raise the argument based on ORS 742.538 in the trial court, the issue was not preserved on appeal. *Doi v. Halekulani Corp.*, 276 F3d 1131, 1140 (9th Cir. 2002); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F3d 1101, 1108

(9th Cir. 2001); *Heller v. Doe*, 509 US 312, 318-319, 125 L Ed 2d 257, 113 S Ct 2637 (1993).

Reply to Argument II: The Panel's Decision Conflicts with Decisions of the Federal Circuits

At pages 19-20, respondent Providence contends that a "second" category of cases relied upon by the McDowells involved federal claims for reimbursement of benefits paid. Respondent then states: "In each case, the court [of appeal] found that such claims are not properly brought in federal court under ERISA." Respondent Providence's characterization of these cases is not entirely accurate. Some of these cases are described below:

(1) *Qualchoice, Inc. v. Rowland*, 367 F 3d 638 (6th Cir. 2004): Respondent contends that in *Qualchoice*, the fiduciary brought a "federal claim for reimbursement of benefits paid." In fact, the fiduciary attempted to make a claim under "federal common law," which the fiduciary characterized as a claim for "equitable restitution." The sixth circuit held that 29 USC § 1132(a)(1) was the **exclusive** basis for federal subject matter jurisdiction for civil enforcement proceedings. 367 F3d at 643.

(2) *Cooperative Benefit Adm. v. Ogden*, 367 F3d 323 (5th Cir. 2004): The fiduciary made a federal common law claim on a theory of unjust enrichment. The fifth circuit rejected the claim, holding the fiduciary's complaint failed to state a claim.

(3) *Community Health Plan v. Mosser*, 347 F3d 619 (6th Cir. 2003): The fiduciary brought a federal common law claim for specific performance and restitution. The sixth circuit dismissed the complaint.

(4) *Honolulu Joint App. & Train. Committee v. Foster*, 332 F3d 1234 (9th Cir. 2003): The administrator

originally brought suit in state court, but the action was dismissed as preempted. The administrator then brought suit in federal court, and sought "restitution." The ninth circuit held the administrator's claim was not "appropriate equitable relief."

(5) *Primax Recoveries v. Sevilla,* 324 F3d 544 (7th Cir. 2003): The employer's assignee brought an action for declaratory relief seeking a ruling "that [the employer's] plan overruled the state [Illinois] common fund doctrine." The assignee's complaint was dismissed.

(6) *Bauhaus USA v. Copeland,* 292 F3d 439 (5th Cir. 2002): The administrator brought a declaratory judgment action seeking a declaration that ERISA preempted the state law which required court approval of the assignment of a minor's right to insurance proceeds. The complaint was dismissed.

(7) *Pacificare v. Martin,* 34 F3d 834 (9th Cir. 1994): The ninth circuit held there is no federal common law claim for reimbursement by a fiduciary.

As petitioner has previously pointed out, ERISA precludes any common law claim, federal or state. See, *Sanson v. General Motors Corp,* 966 F2d 618, 621- 622 (11th Cir. 1992), *reh den*, 974 F2d 1350, *cert den*, 507 US 984.

CONCLUSION

This court should grant petitioner McDowells' petition, vacate the decision of the ninth circuit in **McDowell I**, and affirm the decision of the district court.

Respectfully submitted,

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(4)

Supreme Court, U.S.
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No. 04-883

In The

Supreme Court of the United States

GARY McDOWELL and ROSELEA McDOWELL,
Petitioners,
v.

PROVIDENCE HEALTH CARE PLAN,
an Oregon non-profit corporation,
Respondent.

On Petition for a Writ of *Certiorari* To The
United States Court of Appeals
for the Ninth Circuit

SUPPLEMENTAL AUTHORITY

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SUPPLEMENTAL AUTHORITY

On March 16, 2005, the Third Circuit decided the case of *Levine v. United Healthcare Corporation*, _____F3d_____, 2005 WL 602436 , 2005 U.S. App. LEXIS 4318 (3rd Cir. 2005). In that case, interlocutory cross-appeals were filed concerning, *interalia*, the issue of ERISA preemption. ERISA health plan beneficiaries brought actions in state court against the ERISA insurers on theories of unjust enrichment to recover amounts the beneficiaries paid from third-party tort recoveries pursuant to reimbursement and subrogation clauses in the health plan. The insurers removed the actions to federal, and the beneficiaries moved to remand. The plan beneficiaries sued the insurers in state court after the Supreme Court of New Jersey held that the clauses in the health plan were in valid under a New Jersey state statute. The beneficiaries sought to remand the case back to state court. The district court denied the beneficiaries' motions. The insurers moved to dismiss the beneficiaries' claims, contending the New Jersey statute was preempted by ERISA. The district court denied the insurers' motions to dismiss.

On appeal, the Third Circuit held that the beneficiaries' state claims for unjust enrichment were within the scope of § 502(a) of ERISA [49 U.S.C. §1132(a)] because they were claims to recover benefits due under the terms of the plan, or to enforce rights under the plan, or to clarify rights under the plan. Opinion, p. 3. In so deciding, the Third Circuit relied on two cases decided in other circuits, namely *Arana v. Ochsner Health Plan*, 338 F3d 433 (5th Cir. 2003) [1] and *Singh*

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[1] In *Arana*, the Fifth Circuit held that federal jurisdiction was proper where plaintiff plan beneficiary filed an action in state court seeking a declaratory judgment that his health insurer had no right to reimbursement of health benefits from plaintiff plan beneficiary's third-party tort recovery. Plaintiff plan beneficiary claimed that Louisiana state law invalidated a the plan's reimbursement provision. Defendant health insurer removed the case to federal court. The panel which initially decided the appeal held that district court did not have subject matter jurisdiction, and directed the district court to remand plaintiff's claims to state court. The Fifth Circuit

v. Prudential Health Care Plan Incorporated, 335 F3d 278 (4th Cir. 2003). [2] The Third Circuit held that the beneficiaries' claims were claims to recover benefits wrongly paid to and received by defendant health insurers. The Third Circuit Stated:

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granted the petition for rehearing *en banc*. The Fifth Circuit *en banc* held that the declaratory judgment action was completly preempted by ERISA because the plaintiff plan beneficiary's claim for declaratory relief (requiring the insurer to release its claim of lien and withdraw its reimbursement claim was in essence a claim to enforce his rights under the plan as modified by Louisiana state law, and the claim was therefore completely preempted. 338 F3d at 437-440.

[2]In *Singh*, the Fourth Circuit also addressed a plan beneficiary's claims filed in state court for unjust enrichment and negligent misrepresentation to recover amounts paid to the insurer under plan reimbursement and subrogation clauses. Plaintiff plan beneficiary contended that the plan clauses were invalid and unenforceable under state law. Defendant health insurer removed plaintiff's claims to federal court. The district court denied plaintiff's motion to remand. On appeal, the Fourth Circuit held removal was appropriate because subject matter jurisdiction should not be affected by "the fortuity of *when* a plan term was misapplied to diminish the benefit" 335 F3d at 291 (emphasis in original). The Fourth Circuit held:

> "Singh's claim to recover the portion of her benefit that was diminished by her payment to Prudential under the unlawful subrogation term of the plan is no less a claim for recovery of a plan benefit under § 502(a) than if she were seeking recovery of a plan benefit that was denied in the first instance." 335 F3d at 291 .

Plaintiff's payment to defendant health insurer diminished the benefits to which plaintiff was entitled:

> "Thus, for purposes of complete preemption under § 502(a), a claimant who is denied a benefit is no different than a claimant who is faced with an invoice from the insurer for the return of a benefit paid or a claimant who has paid such an invoice, because resolution in each case requires a court to determine entitlement to a benefit *under the lawfully applied terms* of an ERISA plan." 335 F3d at 291 (emphasis in original).

The Fourth Circuit also held:

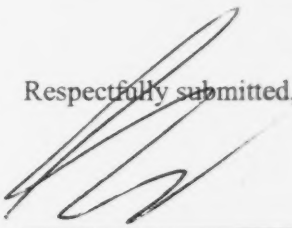
> ". . . that when the validity, interpretation or applicability of *a plan term* governs the participant's entitlement to a benefit or its amount, the claim for such a benefit falls within the scope of § 502(a)." 335 F3d at 291.

> "Thus, [the plan beneficiaries'] claim essentially that they are entitled to have certain health insurance claims paid under their ERISA plans. It is impossible to determine the merits of the [plan beneficiaries'] claims without delving into the provisions of their ERISA-governed plans." Opinion, p. 4.

The Third Circuit concluded that although the beneficiaries attempted to characterize their claims as based only on state law, the essence of the claims concerned an ERISA plan. As a result, the removal was proper. Opinion, p. 5.

Although not relevant to this petition for *certiorari*, the Third Circuit also held that ERISA preempted the New Jersey anti-reimbursement statute, and that it was not saved from preemption as a law regulating insurance. Opinion, pp. 5-7.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2005, I served three copies of the foregoing **SUPPLEMENTAL AUTHORITY** on the following named person(s) on the date indicated below, by

[X] Federal Express.

to said person(s) a copy thereof:

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